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Supreme Court of the United States

October Term, 1968

No. 1276

WILLIAM H. ROBERTS,
Petitioner,

v.

WILLIAM J. McDONALD
and
THE CATHOLIC UNIVERSITY OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM H. ROBERTS
Petitioner pro se

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on January 17, 1969 (App. A).*

CITATIONS TO OPINIONS BELOW

The per curiam opinion of the Court of Appeals, filed January 17, 1969, is unreported and is printed in Appendix B, *infra* pp. ~~2a-3a.~~ 3a-5a The findings of fact and conclusions of law of the District Court, filed November 21,

* The Appendix to this petition is referred to herein as "App." and the record certified from the courts below is referred to as "R". Petitioner was the plaintiff in the District Court and the Appellant in the Court of Appeals.

7a-11a

1967, are printed in Appendix D, *infra* pp. ~~5a-8a.~~ The Order of the District Court, filed February 8, 1968, is printed in Appendix E, *infra.* The Oral Remarks made by the District Court in the hearing on February 2, 1968, are printed in Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1969 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals in affirming the Orders of the District Court denying Petitioner's motions for preliminary injunctions interpreted and construed Rule 52(a) *Fed. R. Civ. P.* in a way which (a) conflicted with applicable decisions of this Court; and (b) conflicted with decisions of other courts of appeals on the same matter;

2. Whether Rules 11(d) and 12(b) of the General Rules of the Court of Appeals are consistent with Rules 34(b) and 47 *Fed. R. App. P.;*

3. Whether Rule 8(d) of the General Rules of the Court of Appeals meets the constitutional requirements of providing sufficiently clear and reasonable standards for sound judicial determinations in the administration of justice;

4. Whether assignment of the instant case to another division of the Court of Appeals without serving notice of entry on Petitioner violated his constitutional right to due notice as, specifically, amplified by Rules 27(b), 27(c), 35(b) and 45(c) *Fed. R. App. P.*

5. Whether, in the circumstances of the instant case, the Court of Appeals departed so far from the accepted and usual course of judicial proceedings, and sanctioned so far such a departure by the District Court, as to call for

an exercise of this Court's power of supervision pursuant to Rule 19 of the Rules of this Court; specifically, whether, in the circumstances of the instant case, the Court of Appeals violated by arbitrary and unreasonable delays Petitioner's constitutional right "to have justice administered without delay".

STATUTES AND RULES INVOLVED (See page (vi))

STATEMENT

The Proceedings in the Courts Below

The jurisdiction of the District Court was based on Title II, Section 521(a)(1), District of Columbia Code (1961 Edition, Supplement V, 1966). Respondent, The Catholic University of American (hereinafter "University"), is a recognized educational institution, chartered for non-profit educational purposes by the District of Columbia, which Charter was approved and amended by Congress (App. O).

On October 24, 1967, Petitioner filed in the District Court a motion for preliminary injunction which the University's Academic Senate (hereinafter "Senate") mooted by a resolution passed on October 26, 1967. On the aforesaid date, the Senate also passed a resolution recommending to the University's Board of Trustees (hereinafter "Board") to dissolve as of February 7, 1968, the University's Institute of International Law and Relations (hereinafter "Institute"), which was administered by Petitioner who was the Institute's Director. (R. 321-345).

On November 2, 1967, Petitioner filed in the District Court an amended motion for preliminary injunction (hereinafter "first motion") seeking to enjoin the University, and others acting in concert with it, from implementing or carrying out the aforesaid Senate resolution, and also from taking any action having the same effect, or from altering the status of the aforesaid Institute (R. 190-191). The District Court denied Petitioner's aforesaid first motion and filed its Order together with Findings of

Fact and Conclusions of Law on November 21, 1967 (App. C, D).

On January 22, 1968, Petitioner filed in the District Court another motion for preliminary injunction (hereinafter "second motion") which was based on grounds different from those on which Petitioner had relied in his first motion, and also on additional material which had previously not been discoverable. The District Court denied the aforesaid second motion and filed its Order, without findings of fact and conclusions of law, on February 8, 1968 (App. E).

Petitioner filed notices of appeal from the denial of the first motion on November 28, 1967, and from the denial of the second motion on February 15, 1968. On February 8, 1968, the Respondents filed in the Court of Appeals a motion to dismiss the appeal from the Order of the District Court of November 21, 1967, because of mootness. This motion was denied by the Court of Appeals on March 11, 1968 (App. G). Upon motion of Petitioner, the Court of Appeals by its Order of April 3, 1968 (App. H) consolidated the aforesaid appeals for all purposes.

On November 15, 1968, the Court of Appeals ordered that the consolidated cases be placed on a summary calendar (App. L). After oral argument on January 7, 1969, the Court of Appeals affirmed the Orders of the District Court by its Judgment and Opinion per curiam, filed on January 17, 1969 (App. A, B).

Summary of Facts

On January 21, 1965, the Executive Committee of the Board authorized the then Rector, i.e., President, of the University to conclude an agreement with Petitioner regarding the establishment of a new academic unit, the Institute, and regarding Petitioner's appointment as Director of the aforesaid Institute (R. 444-445). The aforementioned agreement was concluded on February 5, 1965

(R.374-388) and the Institute's activities under Petitioner's directorship commenced as of September 1, 1965. Even prior to this date, certain influential faculty members, who were also members of the Senate, had started a concerted campaign against the Institute and Petitioner which campaign was later also extended to include the Institute's faculty and students (R.322-326). Under the pressure of this campaign, the administration of the University started to violate its legal duties under the aforesaid contract by failing, *inter alia,* to provide the Institute—in spite of a rapidly growing student body—with adequate financial, academic and administrative support (R.326-328). Finally, on May 25, 1966, Petitioner filed a complaint—and on September 27, 1966, an amended complaint—in the District Court asking, *inter alia,* for permanent injunctive and other necessary relief, as well as for damages covering the period until May 1966, i.e., a period ending 1½ years prior to the filing of the first motion for preliminary injunction.[1] The Respondents entered a general denial. On October 16, 1967, a new acting administration of the University was appointed and ten days thereafter, i.e., on October 26, 1967, the Senate, without prior consultation with or notification of Petitioner, passed a resolution recommending to the Board on purported "policy" and "administrative" grounds that the Institute be dissolved (App. D, *infra,* pp.8a-10a). The Board, again without consultation with Petitioner, passed on November 12, 1967, a resolution dissolving the Institute as of February 7, 1968 (R.434-435). Substantial and uncontradicted evidence supports Petitioner's assertions that the action of the Board was arbitrary and unlawful, and that the actions taken showed clearly all elements of prima facie tort on the part of the University and others acting in concert.[1] (R.632-639).

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[1] Incidentally, in view of the irreparable injury sustained, Petitioner has not claimed damages for the period after May 1966.

REASONS FOR GRANTING THE WRIT.

1. The conflict between the interpretation and construction of Rule 52(a) *Fed. R. Civ. P.* in the courts below, and the decisions of this Court as well as other appellate courts (pp. 7-10, *infra*).

2. The importance and urgency to resolve with finality the question whether Rules 8(d), 11(d) and 12(b) of the General Rules of the Court of Appeals are consistent with the *Fed. R. App. P.* and/or meet constitutional requirements for specificity, etc. (pp. 10-12, *infra*).

3. The importance and urgency to exercise this Court's supervisory powers over the administration of justice in the Court of Appeals, specifically in view of recent severe criticisms by the aforesaid court's own judges (pp. 13-15, *infra*).

4. The importance of a clear-cut issue of law which should be decided by this Court in spite of the interlocutory character of the instant case because the issue is fundamental not only to the future conduct of the instant case but also for other cases, present and future. The aforesaid issue is that of the scope of immunity ~~(from below)~~ from judicial review ~~(pp. 16-21, *infra*)~~ of this Nation's universities and colleges (pp. ~~16~~-21, *infra*):

5. Finally, the instant case does not only involve the litigants but roughly 100 faculty members and students who matriculated in the Institute in reliance on the University's official announcements.

ARGUMENT

I.

The Writ Should Be Granted Because The Court Of Appeals Decided A Federal Question In A Way Conflicting With Applicable Decisions Of This Court And Of Other Courts Of Appeals.

1. The District Court denied Petitioner's first motion by its Order of November 21, 1967 which it filed together

with findings of fact and conclusions of law (App. C., D). The aforesaid motion was based on the ground that the violation of the legal duties incumbent upon the University pursuant to its aforesaid contract with Petitioner, namely, specifically, the duties of the University to forebear to incapacitate itself from performing the aforesaid contract and to forebear to interfere with Petitioner's performance of aforesaid contract, required the issuance of a preliminary injunction. (R. 194-198).

2. The District Court denied Petitioner's second motion by its Order of February 8, 1968. (App. E). The aforesaid second motion was based on grounds fundamentally different from those on which Petitioner had relied in his first motion. The grounds relied on in the aforesaid second motion were: (a) the wrongful conduct of the University in arbitrarily, maliciously and unreasonably dissolving the Institute during the term of Petitioner's service with the University; (b) regardless of the aforementioned contract, the wrongful conduct of the University in arbitrarily, maliciously and unreasonably dissolving the aforesaid Institute on eleven weeks' notice and in the middle of an academic year in violation of well-established academic usage requiring the gradual phasing out of academic units; and (c) ~~on~~ the public interest in protecting students from the adverse consequences of the dissolution of the aforesaid Institute in which they had matriculated in good faith and in reliance on the official announcements of the University. See *F.T.C. v. Rhodes Pharmacal Co.*, 191 F. 2d 744, 747 (7 Cir. 1951).

3. The findings of the District Court filed with its Order of November 21, 1967, (App. D) consisted exclusively of ultimate conclusions and fell, therefore, short of the requirements and standards established by this Court in *Kelley v. Everglades Draining District*, 319 U.S. 415, 420, 421 (1943), namely ~~that~~ that

> "...~~that~~ there must be findings in such detail and exactness as the nature of the case permits,

> of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

Also, this Court said in *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953) that

> "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied. . .Otherwise the findings are useless for appellate purposes."

See also: *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 292, 293 (1960)

Deal v. Cincinnati Board of Education, 369 F. 2d 55, 63, 64 (6 Cir. 1966), *cert. den.* 389 U.S. 847 (1967)

Silberblatt v. United States, 353 F. 2d 545, 549 (5 Cir. 1965)

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I.C.C. v. Cardinale Trucking Co., 308 F. 2d 435, 436, 437 (3 Cir. 1962)

Shannon v. Retail Clerks Protective Association, 128 F. 2d 553, 555 (7 Cir. 1942)

United States v. Forness, 125 F. 2d 928, 942, 943 (2 Cir. 1942).

In addition, the findings of the District Court are a *verbatim* transcript of the findings suggested by Respondents which were filed on November 13, 1967, i.e., prior to the District Court's Order of November 27, 1967, granting Petitioner's motion to supplement record and admitting two additional affidavits (R. 203). Therefore, the

District Court disregarded completely that this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 657 (1964) had "...underscored the responsibility of district courts with respect to findings, and was critical of any indiscriminate dependence upon counsel for formulating them" *Featherstone v. Barash supra* at 249.

4. As stated heretofore, Petitioner's second motion relied on grounds which were entirely different from those on which he had relied in his first motion. Nevertheless, the District Court ~~in~~ denying Petitioner's second motion deemed it sufficient to say in its oral remarks that there was

> "...nothing in the Second Amended Motion that would change the situation as it existed when Judge Sirica ruled...on the request to keep the matter in status quo." (App. F).

In its Order filed on February 8, 1968 (App. E) the District Court simply stated without any further findings that it denied Petitioner's second motion

> "...upon further consideration of the record and file in this case...and it appearing to the Court that the plaintiff has failed to make any showing that he is entitled to the extraordinary relief requested..."

It is submitted that the aforesaid general conclusory statements of the District Court were neither findings of fact nor did they, if erroneously considered to be such findings, meet the aforementioned requirements of Rule 52(a) *Fed. R. Civ. P.*

5. Clearly, the Court of Appeals in holding that

> "...it seems clear to us in any event that the findings of fact made in the District Court are beyond serious challenge under Rule 52(a) *Fed. R. Civ. P.*..."

decided a federal question in a way which was, as heretofore stated, in conflict with the aforementioned applicable

decisions of this Court and also in conflict with the aforementioned decisions of other courts of appeals.

II.

The Writ Should Be Granted To Protect The Policy Expressed By This Court In Rules 34(b) And 47 Fed. R. App. P.

1. In its Order of November 15, 1968 (App. [illegible]) the Court of Appeals placed the instant case "...*sua sponte* pursuant to Rule 11 of the General Rules of this Court...on the summary calendar." Rule 11(d) of the aforesaid General Rules of the Court of Appeals leaves it to the discretion of the aforesaid court to place an *individual* case on a summary calendar if it is, in the opinion of the Court of Appeals, "...of such character as not to justify extended oral argument..." Rule 12(b) of the aforesaid General Rules, then, provides that "..only 15 minutes to a side shall be allowed [for argument] to cases placed on the summary calendar..."

Clearly, Rules 11(d) and 12(b) of the aforesaid General Rules are inconsistent with Rule 34(b) *Fed. R. App. P.* which provides that

> "Unless otherwise provided for by rule *for all cases or for classes of cases*, each side will be allowed 30 minutes for argument" (emphasis added).

Since, pursuant to Rule 47 *Fed. R. App. P.*, courts of appeals have only been authorized to "...make and amend rules...not inconsistent with these rules," the Court of Appeals had no power to make Rules 11(d) and 12(b) of its aforementioned General Rules. Clearly, the policy expressed in Rule 34(b) *Fed. R. App. P.* is that Rule 44(3), last sentence, of the Rules of this Court, which the Court of Appeals attempted to re-state in Rule 11(d) of its General Rules, is not applicable to courts of appeals in view of their organizational structure which differs fundamentally from that of this Court. Therefore, Rule

34(b) *Fed. R. App. P.* provided for obvious reasons that the time allowed for argument under the aforesaid rules may not be changed by courts of appeals in *individual* cases but only "...by rule for all cases or for classes of cases..." Consequently, the Order of the Court of Appeals of November 15, 1968 placing the instant case on a summary calendar and, thereby, allotting to it pursuant to Rule 12(b) of the aforesaid General Rules "...only 15 minutes to a side..." violated Petitioner's rights pursuant to Rule 34(b) *Fed. R. App. P.*

III.

The Writ Should Be Granted In Support Of The Constitutional Requirement For Sufficiently Clear And Reasonable Standards, And For Due Notice In the Administration of Justice.

1. On February 8, 1968, Respondents filed in the Court of Appeals a motion to dismiss Petitioner's appeal. The aforesaid motion of Respondents was based on the assertion that the instant case had been mooted by the unlawful conduct of the University in dissolving the Institute and by the University's attempt to complete the acts which Petitioner sought to have enjoined by the courts. However, cf. *Porter, Price Administrator v. Lee*, 328 U.S. 246, 251 (1946). In its Order of March 11, 1968 the Court of Appeals (Judges Burger, Tamm and Robinson) denied Respondents' aforementioned motion. (App. G). However, the instant case came on to be heard and was decided by Judges McGowan, Leventhal and Robinson (App. A, B).

Although Petitioner was never served a notice of entry pursuant to Rule 45(c) *Fed. R. App. P.*, the Court of Appeals had obviously determined pursuant to Rule 8(d) of its General Rules that "...the instant case should be assigned...to a new division chosen by lot."

It is submitted that Rule 8(d) of the aforesaid General Rules of the Court of Appeals does not meet constitutional requirements by failing to provide any standards

whatsoever for the court's determinations to shift cases from one of its divisions to another. The aforesaid rule is so vague that it leaves the public uncertain as to the standards, if any, which will guide the Court of Appeals in making determinations under the aforesaid rule. It has been aptly stated that

> "The due process clause has as its purpose the insuring of the fair and orderly administration of the laws. . ." 16 Am. Jur. 2d 935.

This Court has only recently stated again that

> "Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards. . ." *Giaccio v. State of Pennsylvania,* 382 U.S. 399, ~~402~~, 403 (1966).

Clearly, Rule 8(d) of the aforementioned General Rules can easily lead to a policy of unreasonable and arbitrary re-assignments of cases, a policy which would be contrary to ". . .principle[s] of justice ranked as fundamental. . ." 16 Am. Jur. 2d ~~*supra*~~ 944.

2. As heretofore stated, Petitioner was never served a notice of entry pursuant to Rule 45(c) *Fed. R. App. P.* to the effect that the Court of Appeals had determined to re-assign the instant case to another division. The failure to give Petitioner due notice of the re-assignment of the instant case did not only violate his constitutional rights but also his rights and privileges thereunder and, specifically, pursuant to Rules 27(b), 27(c) and 35(b) *Fed. R. App. P.*

IV.

The Writ Should Be Granted In The Exercise Of This Court's Power Of Supervision Over The Court Of Appeals.

1. The Court of Appeals departed in many instances so far from the accepted and usual course of proceedings as

to call for an exercise of this Court's power of supervision. The aforesaid instances include, but are not limited, to the following:

(a) The Court of Appeals (Chief Judge Bazelon) arbitrarily and unreasonably (App. M, N) delayed proceedings for 43 days prior to issuing its Order of August 6, 1968 (App. I);

(b) The Court of Appeals (Chief Judge Bazelon) granted Respondents in the aforesaid Order of August 6, 1968 *sua sponte* and in violation of Rules 31(a) and 26(b) *Fed R. App. P.* an extension of 30 days ~~(App. I)~~ from the date of the aforementioned Order for filing their principal brief; (App. I);

(c) The Court of Appeals (Judge Wright) denied by its Order of August 21, 1968 (App. J) and in violation of Rule 27(c) *Fed. R. App. P.*, namely through another single judge, Petitioner's motion to review its aforementioned Order of August 6, 1968;

(d) The Court of Appeals (Chief Judge Bazelon) denied by its Order of October 8, 1968 (App. K) and in violation of Rule 27(c) *Fed. R. App. P.*, namely through another single judge, Petitioner's motion to vacate Judge Wright's aforesaid Order of August 21, 1968. Incidentally, the Chief Judge of the Court of Appeals himself, thus, ultimately denied, Petitioner's motion to review the Chief Judge's own Order of August 6, 1968;

(e) On several occasions (R. 713-716) Petitioner has had asked the Court of Appeals for speedy determination of his appeal from the Orders of the District Court on the ground, first, that such speedy determination was the purpose of the Interlocutory Appeals Act of 1958; secondly, ~~the~~ Rule 2 *Fed. R. App. P.* expressly extended that the aforesaid policy to all cases "...of pressing concern to the public [and] to the litigants" *Advisory Committee's Note to Rule 2 Fed. R. App. P.*; and thirdly, that the instant case was of pressing concern to the public and to the litigants. Nevertheless, the Court of Appeals

(Chief Judge Bazelon) failed for a period of fifty days, namely from August 19, 1968, to October 8, 1968, to rule on an untimely motion of the Respondents in which they had asked for an extension of time for filing their principal brief until October 7, 1968. In its Order of October 8, 1968, i.e., four days after the Respondents had finally filed their brief (which four-day period included a weekend), the Court of Appeals (Chief Judge Bazelon) directed the Clerk to file the brief ". . .it appearing that counsel for appellees have lodged appellees' brief. . .within the extended period of time requested by the aforesaid motion. . ." (App. K).

The aforesaid delay of fifty days in ruling on the motion of Respondents deprived Petitioner of his right pursuant to Rule 27(c) *Fed. R. App. P.* to file a motion requesting review if an order granting the aforesaid motion should have issued. Thus, this delay deprived Petitioner of his right to speedy determination of his appeal. The Court of Appeals by failing to rule promptly on the aforesaid simple motion for extension of time and by, thus, delaying the disposition of the motion until after the Respondents had filed their principal brief, also violated Petitioner's constitutional right to "have justice administered without delay." See *Commonwealth v. Keenan,* 347 Pa. 574, 33 A. 2d 244, 249 (1943); *In Re Sarisohn,* 27 A.D. 466, 280 NYS 2d 237, 243, 245 (1967).

In the words of this Court in *Kinsella v. United States,* 361 U.S. 234, 246 (1959) "It [due process] has to do. . .with the denial of that 'fundamental fairness, shocking to the universal sense of justice'."

(f) The Court of Appeals deprived Petitioner of his right pursuant to Rule 28(c) *Fed. R. App. P.* to file a reply brief by failing to rule sufficiently in advance of oral argument on his motion to strike the untimely principal brief of the Respondents. (R.). Considering the fact that Petitioner, as stated heretofore, had also been denied the right to present full oral argument pursuant to

Rule 34(b) *Fed. R. App. P.*, this Court's words in *Coppedge v. United States*, 369 U.S. 438, 446, 447, 453 (1961) apply fully to the instant case:

> "In so holding we have been impelled by considerations. . .that it is our duty to assure to the greatest degree possible, within the statutory framework of appeals created by Congress, equal treatment for every litigant before the bar.
>
> . . .we hold Petitioner has not yet received either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trail court."

2. Petitioner submits that the importance and urgency of the exercise of this Court's supervisory powers is enhanced by the fact that the administration of justice by the Court of Appeals has recently been severly criticized by its own judges. Since the cases referred to are yet unreported, parts of the opinions will be printed in the Appendix. (App. R, *infra* p. 31a; App. S, *infra* p. 36a).

V.

The Writ Should Be Granted In View Of The Importance Of The Issue Of The Scope Of Immunity Of Universities From Judicial Review.

1. The Court of Appeals said in its per curiam Opinion (App. B) that Petitioner

> ". . .concededly quarrels with the substance of the action taken to dissolve the Institute, and presses no claim of a lack of opportunity for hearing or other alleged procedual shortcoming."

It is submitted that the issues in the instant case are clearly fundamentally different from what the Court of Appeals believed them to be. Obviously, the issue of a hearing or issues pertaining to academic procedural rights

and their possible violation are not at all relevant to the instant case. The Court of Appeals must have been aware of this fact because it said in the preceding paragraph of its per curiam Opinion that

> "Appellant. . .is a professor at the University whose tenured position is not affected by the termination of the Institute. . ."

Clearly, these contradictions show, at least, lack of inner coherence and of consistency in the aforesaid per curiam Opinion.

In passing, the Court of Appeals recited in its Opinion the well-known fundamental requirements for the issuance of a preliminary injunction without, however, relating them in any way whatsoever to the circumstances of the instant case.

2. The Opinion of the Court of Appeals refers in general terms, and again without reference to the circumstances of the instant case, to a ". . .balancing of appellant's claimed injuries with appellees' *interest and convenience* in respect of the *efficient operation* of a university" (emphasis added).

The issues in the instant case arise from the contractual establishment of an academic unit of the University just 2½ years prior to the unit's dissolution. The Respondents did neither plead nor does the record show that the "interest and convenience" or "the efficient operation" of the University had changed in the course of 2½ years to such a degree that the attempted dissolution could be considered anything else but an unreasonable, arbitrary and malicious act. This would even apply if the academic unit had been established by administrative fiat rather than by contract. In fact, exactly the same circumstances prevailed at the time of the establishment and at the time of the dissolution of the Institute. The only change that had taken place was that ten days prior to the "dissolution resolution" of the Senate the previous University

administration had been replaced by a new acting administration (R.).[2]

3. In fact, the decision of the Court of Appeals affirmed the District Court's Conclusion of Law No. 3 (App. D) namely "That the Court has no jurisdiction in this case to control the internal management of the University." This raises a clear-cut and fundamental issue of law which "...would otherwise [i.e., if the instant case would not have interlocutory status] qualify as a basis for certiorari." Stern and Gressman, Supreme Court Practice, 3rd ed., pp. 148-149, citing *United States v. General Motors Corp.*, 323 U.S. 373, 377; *Land v. Dollar*, 330 U.S. 731, 734, n.2; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3. The aforesaid issue is that of judicial control and/or review of the actions of private associations, including this Nation's universities and colleges. See Note: "Judicial Control of Actions of Private Associations," 76 *Harvard Law Review* 983 (1963).

The courts below were led to believe that the instant case revolved around academic or curricular issues. In fact, the record shows that the instant case revolves around policy and administrative issues (App. D, *infra, pp.*). In Addition, Petitioner's second motion was based on prima facie tort and on issues of public policy (R.).

4. In this connection, Petitioner submits that the following words of this Court in *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) apply fully to the instant case:

> "An educational institution is not a constitutional sanctuary from [legislative] inquiry into

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[2]Respondents' reference in their brief for appellees (R.) that the Senate had recommended "...the dissolution of the Institute on the basis of...academic...considerations" is a gratuitous statement which has no foundation in the record of the instant case (R.)

> matters that may otherwise be within the constitutional legislative domain. . ."

This applies, *a fortiori,* to judicial review of questions which are within the constitutional judicial domain. In fact, it has recently been aptly said that

> ". . .it seems clear that the considerations militating against legislative intervention do not necessarily apply in the case of judicial review. Since the courts hear individual cases, factors of local significance can always be given due consideration" Note: "Academic Freedom," 81 *Harvard Law Review* 1045, 1151 (1968).

This Court has recently said in *Epperson v. State of Arkansas,* 389 U.S. 266, 270 (1968) that

> "Courts do not and cannot intervene in the resolution of conflicts which arise *in the daily operations* of school systems. . .On the other hand, 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'. . .and 'This Court will be alert against invasions of academic freedom. . .'" (Emphasis added).

Clearly, the instant case did not arise in the daily operations of the University which has not only been chartered by Congress (App. O) but is also, as the record shows, tax-exempt, the recipient of considerable public funds and supported by annual collections in all Roman Catholic churches in the United States (R.). The University–similar to nearly all other institutions of higher learning–is today more than ever under an obligation to be vigilant in the protection of constitutional freedoms and of the public interest. In the instant case the specific public interest of protecting students from the adverse effects of the dissolution of the Institute[3] only serves to emphasize the fact that for the

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[3]See p. 7 *supra.*

aforementioned reasons all private institutions of higher learning–including the University–are affected by public interests. See: *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (D.C. W.D. Missouri En Banc, 1968).

Although the internal management of corporations–including private institutions of higher learning–calls *generally* for judicial abstention, institutional autonomy is not the paramount social value. This autonomy "...is conditioned by the expectation that the courts will exercise remedial control" See: "Academic Freedom," 81 *Harvard Law Review supra* at 1151.

4. Specifically, the instant case raises the important question of judicial review of and intervention in the actions of private associations, including institutions of higher learning, in the event of prima facie tort. It has been aptly said that there exists

> "...an increasing willingness of the courts to impose upon associations possessing a high degree of power over nonmembers a duty not to injure them arbitrarily. Private Control of Actions of Private Associations," 76 *Harvard Law Review supra* at 1004.

And also

> "The doctrine of prima facie tort [i.e., an intentional act which without justification injures others] seems particularly useful in dealing with cases involving injury by the act of a private association since such groups frequently possess power to injure individuals through conduct not encompassed within conventional concepts" *Id.* at 1041.

In view of the aforementioned trends and doctrines, the Court of Appeals rendered in the instant case a decision which is clearly in conflict with this Court's decision in

Ohio Oil Co. v. Conway, 279 U.S. 813, (1929). There the Court said:

> "When the questions presented by an application for interlocutory injunction are grave and the injury to the moving party will be certain and irreparable if it be denied and the final decree be in his favor; while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be negligible, or may be indemnified by a bond, the injunction usually will be granted. . . . The order is vacated with directions for further proceedings in conformity with this opinion."

The decision of the Court of Appeals in the instant case is also in conflict with decisions of other courts of appeals on the same matter, namely:

> "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated" *Love v. Atchison, T. & S. F. Ry.*, 185 F. 321, 331-22 (8 Cir. 1911). See also: *Benson Hotel Corp. v. Woods*, 168 F. 2d 694, 697 (8 Cir. 1948); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 743 (2 Cir. 1953); *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F. 2d 867, 871, 872 (2 Cir. 1962).

The decision of the Court of Appeals also conflicts — even on the basis of its own reasoning — with *American Smelting and Refining Co. v. Godfrey*, 158 F.2d 225, 230 (8 Cir. 1907), *cert. den.* 207 U.S. 597 (1907) where the court said:

> "... we do not think the fact that an actual injury resulting from a violation of a right is small, and the

> interest to be affected by an injury is large, should weigh against the interposition of preventive power in equity, when it is clear that on the one hand a right is violated and on the other a wrong committed."

Finally, the decision of the Court of Appeals – even on the basis of its own reasoning – conflicts with *Hamilton Watch Co. v. Benrus Watch Co., supra,* at 740, where the court said:

> "To justify a temporary injunction . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation."

Petitioner submits that the powers provided by 28 U.S.C. Section 1651 give this Court and/or the courts below ample opportunity to grant the relief sought by Petitioner by granting a mandatory injunction re-establishing the Institute as it existed on November 12, 1967.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ROBERTS
Petitioner pro se,

APPENDIX A

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 21,501

September Term, 1968.

Civil 1381-66.

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees.

No. 21,771

Filed Jan. 17, 1969

William H. Roberts,
Appellant,

v.

William J. McDonald and Catholic University,
Appellees.

Appeals from the United States District Court for the District of Columbia.

Before: McGowan, Leventhal, and Robinson, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgments of the District Court appealed from in these cases are hereby affirmed.

Per Curiam

For the Court:

Nathan J. Paulson
Clerk

Dated: January 17, 1969.
Opinion per curiam.

APPENDIX B

[Not to be printed or submitted to West for publication]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 21,501

WILLIAM H. ROBERTS,
Appellant,

v.

WILLIAM J. McDONALD,
Individually, et al.,
Appellees.

No. 21,771

WILLIAM H. ROBERTS,
Appellant,

v.

WILLIAM J. McDONALD
and
CATHOLIC UNIVERSITY,
Appellees.

Appeals from the United States District Court for the District of Columbia

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Decided January 17, 1969

Mr. William H. Roberts, appellant pro se. *Mr. Richard L. Hirshberg* was on the brief for appellant.

Mr. Thomas A. Flannery, with whom *Mr. Stephen A. Trimble* was on the brief, for appellees. *Mr. Nicholas D. Ward* also entered an appearance for appellees.

Before McGOWAN, LEVENTHAL, and ROBINSON, *Circuit Judges.*

PER CURIAM: These appeals are from successive denials to appellant in the District Court of a preliminary injunction against the impending dissolution by appellee Catholic University of an administrative entity within its instructional arrangements known as the Institute of International Law and Relations. Appellant was the director of the Institute throughout its life, and is a professor at the University whose tenured position is not affected by the termination of the Institute and the transfer of its functions to established departments. In his complaint appellant sought both damages and injunctive relief, but all that is now before us is the refusal of appellant's requests for a preliminary injunction.

Injunctions pending appeal having been denied by this court and the Supreme Court, and the dissolution of the Institute having heretofore been accomplished, it is suggested that these appeals are moot. We do not, however, pursue that question because it seems clear to us in any event that the findings of fact made in the District Court are beyond serious challenge under Rule 52(a), *Fed. R. Civ. P.*, and that the denials of a preliminary injunction founded thereon were amply within the bounds of a sound judicial discretion. In this regard we remark the relevance of such factors as the nature of the injury alleged in relation to the need for equitable relief, the probabilities that appellant would ultimately prevail on the merits, and the balancing of appellant's claimed injuries with appellees' interest and convenience in respect of the efficient operation of a university. We also note that appellant concededly quarrels with the substance of the action taken to dissolve the Institute, and

presses no claim of a lack of opportunity for hearing or other alleged procedural shortcoming.[1]

Affirmed.

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[1] Various motions have been filed in this court. Insofar as they are not rendered moot by this opinion and accompanying order, they are denied.

APPENDIX C

UNITED STATES DISTRICT COURT

for the District of Columbia

WILLIAM H. ROBERTS *Plaintiff*	)	Civil Action No. 1381-66
v.	)	
WILLIAM J. McDONALD, *et al.* *Defendants*	)	Filed: NOV. 21, 1967 Robert M. Stearns, Clerk

ORDER

Upon consideration of the amended motion for preliminary injunction filed herein by the plaintiff, the opposition thereto of the defendant, and upon further consideration of the argument of counsel in open court, and it appearing to the Court that said motion should be denied, it is, by the Court, this *21st* day of November, 1967.

ORDERED, that the amended motion of the plaintiff for a preliminary injunction be and the same is hereby denied.

/s/ John J. Sirica

JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
for the District of Columbia

WILLIAM H. ROBERTS, *Plaintiff,*	)	
v.	)	Civil Action No. No. 1381-66
WILLIAM J. McDONALD, *et al., Defendants.*	)	Filed NOV. 21, 1967 Robert M. Stearns, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the Amended Motion for Preliminary Injunction filed herein by plaintiff, the Opposition thereto of the defendant, the record and file of this case, and the arguments of counsel at the hearing thereof, the Court makes the following:

FINDINGS OF FACT

1. That plaintiff, a teacher in the fields of politics and international law and relations, has been employed by the defendant University for a period in excess of twenty years.

2. That the defendant Catholic University of America is a recognized educational institution of higher learning, chartered pursuant to an Act of Congress for non-profit educational purposes.

3. That said University is operated, managed and controlled by a Board of Trustees, pursuant to the Statutes of the Catholic University of America, which are binding upon all persons connected with the University, including the plaintiff herein.

4. That plaintiff, effective February 1, 1962, was appointed by the Rector of the University as an Ordinary

Professor, at an annual salary of $8,500.00 (since increased pursuant to the University's salary structure), and enjoys permanent tenure as an Ordinary Professor until retirement under the Statutes of the University.

5. That plaintiff was subsequently given a supplementary appointment as head of the Department of Politics from November 1, 1963 to October 31, 1965 at a salary of $250.00 per year in addition to his salary as an Ordinary Professor.

6. That the Board of Trustees, on January 21, 1965, authorized the establishment of the Institute of International Law as distinct and separate from the Department of Politics, and approved the appointment of the plaintiff as Director of said Institute.

7. That on February 5, 1965, pursuant to another resolution contained in the action of the Board of Trustees aforesaid, a meeting was held between plaintiff, the Rector of the University, and the heads of certain other departments of the University. At said meeting, a plan for the implementation of the Trustees actions were adopted by those in attendance.

8. That effective September 1, 1965, plaintiff's earlier appointment as head of the Department of Politics was revised to read "... to the position of Director of the Institute of International Law and Relations ...".

9. That plaintiff's appointment aforesaid, effective November 1, 1965, was further supplemented to read "... and continuing until further notice at a salary of $250.00 per year payable in monthly installments of $20.83...", and that said salary was later increased pursuant to the University's salary structure.

10. That since his appointment as Director of said Institute, plaintiff has served as Director of the Institute of International Law and Relations, and has received his full salary as an Ordinary Professor, as well as the additional stipend as Director of said Institute.

11. That on October 26, 1967, at a meeting of the Academic Senate of the University, the following transpired:

"Dr. Cardozo read the following resolution, unanimously adopted by the Faculty of the Graduate School of Arts and Sciences at its meeting on 24 October, 1967.

"Resolved: that the delegate to the Academic Senate inform the Senate of our deep concern over the situation of students pursuing courses in the Institute of International Law and Relations and of our desire that the Senate take appropriate action"

The resolution adopted by the Senate on 31 May, 1967, regarding the Institute of International Law and Relations was then discussed. Dr. Rock proposed the following motion:

"That the Senate recommend to the Board of Trustees that, effective at the beginning of the second semester of the current academic year, the Board dissolve the Institute and transfer the programs now administered by the Institute to the Department of Politics of the Graduate School of Arts and Sciences. This recommendation is based on the following considerations of policy:

1. The Institute, as presently constituted, is an anomaly, as is recognized in its representation in the Academic Senate only through the intervention of the Executive Vice Rector.

2. Article 41 of the Statutes assigns to the Senate responsibility for perfecting courses of study and for proposing candidates for Academic Degrees. The Director of the Institute refuses to recognize the competence of the Senate in these matters.

3. Members of the staff of the Institute belong to no faculty and are unable to exercise normal faculty functions or secure adequate representation.

4. Policy and practice in other universities tends to discourage proliferation of degree granting institutes, and to concentrate jurisdiction over academic degrees in normal academic channels.

Further, this recommendation is based upon administrative considerations and experience as follows:

1. The Institute was established without the preliminary planning which should have been undertaken with the cooperation of the Graduate School and the Academic Senate.

2. The Director of the Institute has declined to report to the Academic Senate as required by the Statutes and by custom.

The motion was seconded by Dr. Cardozo and, after discussion, adopted by voice vote."

12. That on November 2, 1967, the Acting Rector of the University notified plaintiff in writing of the action of the Academic Senate aforesaid, and that the same would be presented to the Board of Trustees at its meeting of November 12 and 13, 1967. In addition, the Acting Rector notified plaintiff that he would recommend that if the Board of Trustees voted to dissolve the Institute, all members of the faculty (including plaintiff) and lecturers holding appointments to the Institute shall be transferred to the Department of Politics.

13. That on November 2, 1967, plaintiff filed herein his amended motion for preliminary injunction seeking to enjoin the University from implementing said resolution.

CONCLUSIONS OF LAW

1. That the authorization for the creation of the Institute of International Law and Relations by the Board of Trustees aforesaid, as well as the implementation thereof contained no

provision that said Institute was to endure in perpetuity for a stipulated period of years, or that plaintiff was to be the Director thereof on a permanent basis.

2. That authority and jurisdiction is conferred by the Statutes of the University upon the Academic Senate and the Board of Trustees to initiate and implement the resolution of October 26, 1967.

3. That the Court does not have jurisdiction in this case to control the internal management of the University.

4. That the plaintiff has failed to make any showing of irreparable injury.

5. That if the plaintiff can prove a breach of contract and damages resulting therefrom he has an adequate remedy at law.

/s/ John J. Sirica

District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. ROBERTS Plaintiff	)	
vs.	)	Civil Action
WILLIAM J. McDONALD	)	No. 1381-66
and	)	
THE CATHOLIC UNIVERSITY OF AMERICA	)	
Defendants	)	

ORDER DENYING
PLAINTIFF'S SECOND AMENDED MOTION
FOR PRELIMINARY INJUNCTION

Upon consideration of the plaintiff's Second Amended Motion for Preliminary Injunction filed herein January 23, 1968, the Opposition of Defendant Catholic University to Plaintiff's Second Amended Motion for Preliminary Injunction, Plaintiff's Reply to Opposition of Defendant Catholic University to Plaintiff's Second Amended Motion for Preliminary Injunction, and upon further consideration of the record and file in this case and the arguments of counsel for the respective parties in open court, and it appearing to the Court that the plaintiff has failed to make any showing that he is entitled to the extraordinary relief requested, it is by the Court this *8* day of February, 1968

ORDERED, that the Plaintiff's Second Amended Motion for Preliminary Injunction be and the same is hereby denied.

/s/ _____
JUDGE

APPENDIX F.

ORAL REMARKS OF THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HEARING, February 2, 1968

THE COURT: I find nothing in the second amended motion that would change the situation as it existed when Judge Sirica ruled and the Court of Appeals ruled on the request to keep the matter in status quo.

I will deny the second amended motion for preliminary injunction.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1967
Civil 1381-65

No. 21,501

William H. Roberts,

Appellant,

v.

William J. McDonald, Individually, et al.,

Appellees.

Before: Burger, Tamm, and Robinson,
Circuit Judges, in Chambers.

ORDER

On consideration of appellees' motion to dismiss and of appellant's objections thereto and appellees' reply; and on consideration of appellant's motion to extend the time for filing his brief and joint appendix herein, it is

ORDERED by the Court that appellees' aforesaid motion to dismiss be denied, and it is

FURTHER ORDERED by the Court that appellant's time for filing his brief is extended for a period of 25 days from the date of this order.

Per Curiam.

APPENDIX H

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1967
Civil 1381-66

No. 21,501

William H. Roberts,

Appellant,

v.

William J. McDonald, Individually, et al.,

Appellees.

No. 21,771
William H. Roberts,

Appellant,

v.

William J. McDonald and Catholic University,

Appellees.

Before: Bazelon, Chief Judge,
In Chambers.

ORDER

On consideration of appellant's motion to consolidate the above appeals and to enlarge the time for filing appellant's brief and the joint appendix herein, it is

ORDERED that the above cases are consolidated for all purposes, and appellant's time for filing his brief and the joint appendix is extended to and including May 5, 1968.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967
Civil 1381-66
No. 21,501

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees

No. 21,771

William H. Roberts,
Appellant,

v.

William J. McDonald and
Catholic University,
Appellees.

Before: Bazelon, Chief Judge, in Chambers.

ORDER

On consideration of Appellant's motions to review the orders of this Court filed on July 9 and July 18, 1968 and to reconsider the order filed on July 18, 1968 and Appellant's motion to enlarge the time for filing his brief, it is

ORDERED that not withstanding the orders heretofore entered the Clerk is directed to file Appellant's lodged brief in this case. Appellees' brief shall be filed within 30 days from the date of this order, September 5th.

APPENDIX J

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1967
Civil Action 1381-66

No. 21,501

William H. Roberts,

Appellant,

v.

William J. McDonald, Individually, et al.,

Appellees.

No. 21,771

William H. Roberts,

Appellant,

v.

William J. McDonald and
Catholic University,

Appellees.

Before: Wright, Acting Chief Judge,
in Chambers.

ORDER

On consideration of Appellant's motion to review the order of this Court filed on August 6, 1969, wherein he requests that Appellees be ordered to file their brief forthwith or, if the Appellees file an appropriate motion, that they be ordered to file their aforesaid brief on or before August 20, 1968, it is

ORDERED that the aforesaid motion is denied.

APPENDIX K

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1968
Civil 1381-66

No. 21,501

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees.

No. 21,771

William H. Roberts,
Appellant,

v.

William J. McDonald and Catholic University,
Appellees.

Before: Bazelon, Chief Judge, in Chambers.

ORDER

On consideration of the following: (1) appellees' motion for extension of time to and including October 7, 1968, for filing appellees' brief and appellant's opposition thereto; (2) appellant's motion filed herein on August 29, 1968, entitled "Motion to vacate the order of the acting Chief Judge of this Court filed on August 21, 1968"; (3) appellant's motion filed herein on September 3, 1968, entitled "motion of appellant pursuant to Rules 27(b) and 2 of the Federal Rules of Appellate Procedure to expedite determination of his

motion to vacate the order of this Court filed on August 21, 1968"; (4) appellant's motion filed herein on September 3, 1968, entitled "Second motion of appellant pursuant to Rules 27(b) and 2, Federal Rules of Appellate Procedure, to expedite determination of motion of appellant to review the order of this Court filed on August 6, 1968"; (5) appellant's motion filed herein on September 5, 1968, entitled "motion of appellant pursuant to Rules 45(b) and 2 of the Federal Rules of Appellate Procedure, and Rule 11(b) of the General Rules of this Court to advance the time for the hearing of the above entitled appeal"; and (6) appellant's motion filed herein on September 5, 1968, entitled "motion of appellant pursuant to Rules 27(b) and 2 of the Federal Rules of Appellate Procedure to expedite determination of his motion pursuant to Rules 45(b) and 2 of the Federal Rules of Appellate Procedure, and Rule 11(b) of the General Rules of this Court to advance the time for the hearing of the above entitled appeal"; and it appearing that counsel for appellees have lodged appellees' brief with the Clerk of this Court within the extended period of time requested by their aforesaid motion, it is

ORDERED that the Clerk is hereby directed to file appellees' lodged brief and it is

FURTHER ORDERED that appellant's aforesaid motions are denied.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968
Civil 1381-66

No. 21,501

William H. Roberts,
Appellant,

v.

William J. McDonald, Individually, et al.,
Appellees.

Before: Bazelon, Chief Judge, in Chambers.

ORDER

It is ORDERED, *sua sponte,* pursuant to Rule 11 of the General Rules of this Court that the Clerk is directed to place this case on the summary calendar.

APPENDIX M

AFFIDAVIT

STATE OF VIRGINIA, SS:

COUNTY OF ARLINGTON, SS:

I, Sylvia D. Crutchfield, being duly sworn upon oath, depose and state that:

1. I am an adult citizen of the United States and am secretary to Richard L. Hirshberg, Esq., 132 Third Street, S.E., Washington, D.C., who represents the Appellant, William H. Roberts, in a case pending in the United States Court of Appeals for the District of Columbia Circuit, namely Roberts v. McDonald, Nos. 21501 and 21771.

2. I had been instructed to call the Clerk's Office, United States Court of Appeals for the District of Columbia Circuit in the course of the morning of July 26, 1968, and to make inquiry regarding the status of a Motion filed by Mr. Hirshberg in behalf of the aforesaid Appellant on July 25, 1968. The aforementioned Motion requested enlargement of time to comply with the Order of the aforementioned Court of Appeals filed on July 18, 1968, providing "* * * that Appellant's time for filing a brief in conformity with the Federal Rules of Appellate Procedure and the General Rules of this Court is extended to a period of fifteen days from the date of this order."

3. When I called the Office of the Clerk of the aforesaid Court of Appeals in the course of the morning of July 26, 1968, I addressed my inquiry to Mrs. Elizabeth E. Nameth of the Clerk's Office. Mrs. Nameth informed me that the aforesaid Motion was being sent to the Chief Judge together with other Motions and that there was no certainty as to what time such motion would be acted on but that I might call back about 2:30 P.M. to inquire.

4. At approximately 2:50 P.M. I called Mrs. Nameth, who transferred me to Mr. Stevas' secretary. I addressed my inquiry to her and she left the phone to check the status of the motion.

Mr. Stevas himself then picked up the phone and the following conversation ensued:

Q. Is this Mr. Stevas?

A. Yes.

Q. Mr. Stevas, this is Sylvia Crutchfield, Richard Hirshberg's secretary. I want to ask about the status of a motion to enlarge time for filing brief in Roberts v. McDonald. Has a decision been made on this motion?

A. No. The judge is unavailable and I don't know when he will get to it.

Q. Is it possible that he will be able to make a decision this afternoon?

A. Now listen, I'm getting damn tired of Hirshberg dropping motions off here one day and calling up the next to see why they haven't been signed. Did he get opposing counsel to agree? You know opposing counsel has 7 days to answer in. Of course, the judge can handle it himself. I called Flannery myself to see if he had any objections. Flannery said he had no objection to a 2-week extension of time and I'll tell the judge that and he'll probably go ahead and sign it. Why couldn't Hirshberg pick up the phone and call himself? I'm tired of doing Hirshberg's work for him. I've had this out with him before. This isn't the way we practice law here.

Q. The reason we are so rushed on this particular motion is because Dr. Roberts must notify the printer today so that he may get the brief done on time.

A. You meant it isn't at the printers already? He should have sent it to them when the first order to reprint came down instead of filing all these motions. The Clerk and the Deputy Clerk – which is me – are sick and tired of all these

motions. Why the judge might just say no, no, no to all these motions and order Hirshberg to show cause why the whole thing shouldn't be dismissed. And you can quote me to Hirshberg!

Q. I'll omit the damn.

A. Yes, strike that.

Q. When can we find out the judge's decision?

A. When you come down and pick up a copy of the order.

5. Immediately after the telephone conversation had ended I recorded this conversation and reported it, also immediately to Appellant.

6. I can affirm under oath that the aforesaid record made by me is a complete, true and accurate re-statement of the conversation which I had on the aforementioned occasion with Mr. Stevas.

/s/

SYLVIA D. CRUTCHFIELD

State of Virginia, ss:

County of Arlington, ss:

Subscribed and sworn to before me this *30th* day of August, 1968.

APPENDIX N

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

I. Richard L. Hirshberg, being duly sworn upon oath, depose and state that:

1. I am an adult citizen of the United States and a member of the bars of the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. I represent the Appellant, William H. Roberts, in a case pending in the United States Court of Appeals for the District of Columbia Circuit, namely Roberts v. McDonald, Nos. 21501 and 21771.

2. In the aforesaid case I filed in behalf of Appellant in the aforementioned Court of Appeals on July 25, 1968, the following three Motions

a. A Motion of Appellant to review the orders of the Chief Judge of the aforesaid Court of Appeals respectively filed on July 9, 1968 and July 18, 1968, denying Appellant's Motion to Exceed Page Limitation in Brief for Appellant;

b. A Motion of Appellant to reconsider the Order of the Chief Judge of the aforesaid Court of Appeals filed on July 18, 1968, denying Appellant's Motion to Reduce Time Period to File Brief for the Appellees, and

c. A Motion of Appellant to enlarge time to comply with the Order of the aforesaid Court of Appeals filed on July 18, 1968, providing:

> "* * * that Appellant's time for filing a brief in conformity with the Federal Rules of Appellate Procedure and the General Rules of this Court is extended for a period of fifteen days from the date of this order."

3. On July 26, 1968, I left Washington, D.C. for my vacation in Merrill, New York. On August 2, 1968, the day on which the aforesaid 15-day period "for filing a brief in conformity with the Federal Rules of Appellate Procedure * * " expired, I was informed that, although previous inquiries as to the disposition of the aforesaid Motion had been made, it had not yet been acted upon.

4. Thereupon, I called the Chief Deputy Clerk of the aforesaid Court of Appeals, Alexander L. Stevas, Esq., long-distance in order to make appropriate inquiries as to the disposition of the aforesaid three Motions. In the course of the aforesaid telephone conversation, Mr. Stevas told me that he was going to take up Appellant's Motion for review of the Chief Judge's aforementioned Order of July 18, 1968 with Chief Judge Bazelon. When I directed Mr. Stevas' attention to the fact that this was a Motion for Review which had to be considered by the Court, he replied that he discussed all motions with the Chief Judge. Stevas then added:

> "Now that he [Chief Judge Bazelon] has put you through the wringer in connection with your Motion for Reconsideration [which had been denied by an Order of July 18, 1968] and has cooled off, perhaps he will allow the longer brief to be filed."

5. The above statements of Mr. Stevas were recorded by me immediately after the telephone conversation had ended and were also, in a long-distance call, immediately related to Appellant.

/s/
RICHARD L. HIRSHBERG

District of Columbia, ss:

Subscribed and sworn to before me this *30th* day of August, 1968.

APPENDIX O

Public Law, 235, Seventieth Congress, First Session, 45 Stat. 492 (1928)

CHAP. 312 – An Act Supplementary to, and amendatory of, the incorporation of the Catholic University of America, organized under and by virtue of a certificate of incorporation pursuant to class 1, chapter 18, of the Revised Statutes of the United States relating to the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the incorporation of the Catholic University of America under chapter 18, Revised Statutes of the United States relating to the District of Columbia, be, and the same is hereby, approved and confirmed.

SEC. 2. That in addition to the rights, duties, and obligations enjoyed and imposed by chapter 18 of the Revised Statutes of the District of Columbia the said university may enter into affiliated agreements with any institutions of learning within or outside of the District of Columbia, for the purpose of giving to students of such institutions the educational facilities of said university, upon such terms as are mutually agreed upon by the said university and the affiliated institutions.

SEC. 3. That said university shall have, and is hereby given, the power to increase the number of its trustees from time to time by a two-thirds vote of the whole number of the trustees at the time such vote is taken to a number not exceeding fifty.

In case of the increase of the number of trustees a certificate stating the number of the board and the time when it shall go into effect, and that the action so taken was by a two-thirds vote as required by this Act, shall be filed with the Recorder of Deeds of the District of Columbia.

SEC. 4. The said board of trustees shall have, and are hereby given, full power and authority, by a vote of two-thirds of its members, to adopt and change by-laws for the conduct of the business and educational work of said university, to fix the time of meetings, regular and special, and the form of notice to be given; they may appoint an executive committee composed of trustees, designate the number and chairman thereof, with such powers and authority as are usually exercised by an executive committee, and which shall be conferred by the board subject always to the control of the board of trustees; they may create and establish schools and departments of learning to be connected with and become a part of said university, and establish such scholastic boards and officers as may be required for academic operation and direction in education; they may receive, invest, and administer endowments and gifts of money and property absolute or subject to payments by way of annuities during the life of the donor, for the maintenance of educational work by said university and by any department or chair thereof, now established or which may hereafter be created or established by said university, and they shall have all of the powers and authority heretofore granted to or invested in the trustees of said university by chapter 18 of the Revised Statutes of the United States relating to the District of Columbia.

SEC. 5. That nothing in this Act contained shall be so construed as to prevent Congress from altering, amending, or repealing the same.

Approved, April 3, 1928.

APPENDIX P

Federal Rules of Appellate Procedure

Rule 2 Advisory Committee's Note –

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

APPENDIX Q

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

GENERAL RULES
SUPPLEMENTING THE
FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8(d) Contents of Brief. In addition to the requirements of Rule28, Federal Rules of Appellate Procedure, at the bottom of the statement of issues presented for review, counsel shall indicate whether or not the pending case was previously before this court under the same or similar title and the name and number of such prior case, to enable the court to determine whether the instant case should be assigned to a particular division of the court, or to a new division chosen by lot.

Rule 11(d) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify extended oral argument, the case may be placed on the summary calendar.

No separate summary calendar will be maintained. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court. Such cases may or may not be heard on days set for oral argument of cases not on the summary calendar.

Rule 12(b) Time Allowed for Argument. Counsel in all cases scheduled for argument on the merits shall be allotted 30 minutes to a side, except that only 15 minutes to a side shall be allotted to cases placed on the summary calendar and to motions scheduled for argument. A motion or request pursuant to Rule 34(b), Federal Rules of Appellate Procedure, for the allowance of additional time shall be filed or made not later than 10 days after appellee's brief has been filed.

Where two or more cases are consolidated they shall be considered as one case for the allotment of time for argument.

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,682

MILTON M. LEVIN,
Appellant,

v.

RAMSEY CLARK,
Attorney General of the United States,
Appellee.

[Filed December 16, 1968]

Before: Bazelon, Chief Judge, Danaher, Burger, Wright, McGowan, Tamm, Leventhal and Robinson, Circuit Judges, in Chambers.

ORDER

On consideration of appellee's Petition for Rehearing, *En Banc*, and appellant's opposition thereto, it is

Ordered by the Court, *En Banc*, that appellee's aforesaid petition is denied.

Per Curiam.

Circuit Judges Danaher, Burger and Tamm would grant appellee's petition for rehearing *en banc*.

A separate statement of Cricuit Judge McGowan, concurred in by Circuit Judges Leventhal and Robinson, as to why he voted against rehearing *en banc* is attached.

A separate statement of Circuit Judge Wright as to why he voted against rehearing *en banc* is attached.

A separate statement of Circuit Judge Danaher as to why he voted for rehearing *en banc* is attached.

A separate statement of Circuit Judge Burger as to why he voted for rehearing *en banc* is attached.

Separate Statement on Rehearing En Banc

Burger, *Circuit Judge*: I am satisfied that a majority of the entire court would never have reached the result decided by the majority of the present panel but at the same time less than five Judges[1] believe the panel has laid down a new rule or doctrine of such scope and importance that it merits *en banc* review. Viewed in this light, the holding in *Levin v. Katzenbach*, 124 U.S.App.D.C. 158, 163, 363 F.2d 287, 292 (1966), is therefore confined to its own peculiar facts.

However, I cannot refrain from pointing out, again, as I have before,[2] that the record before us shows – conclusively and beyond dispute – that the information which the panel majority regards as "newly discovered evidence" which Judges Bazelon and Edgerton held the prosecution should have realed to the defense was in fact *literally in the hands of defense counsel* as he sat at counsel table and conducted examination of witnesses in the original trial. This is shown in Judge McGowan's opinion where he recites what Mr. Jacob Stein testified to at the remand hearing and also in the contents of the deposition which Stein utilized in this cross-examination.

---

[1]During consideration of the Government's motion for rehearing *en banc* this court has had only 8 active judges.

[2]Levin v. Katzenbach, 124 U.S.App.D.C. 158, 163, 363, F.2d 287, 292 (1966); Levin v. Clark, No. 20,682 (D.C. Cir., Nov. 15, 1967).

It is not rationally possible to reconcile Mr. Stein's testimony with the notion that he was not aware of the transaction unless we are to assume that Mr. Stein was asleep or otherwise unaware of what was going on around him. Since Mr. Stein is one of the most experienced and able trial lawyers of our bar, I, of course, reject the idea that he did not grasp the facts. Moreover, Mr. Stein's appraisal of the situation was a sound one which any competent advocate would reasonably reach.

What is more important is that any tendency for anyone to read a "new rule" into this case is dispelled by what Mr. Justice Fortas said in *Giles v. Maryland*:

> This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or *speculative information.* But this is not the case.

386 U.S. 66, 98 (1967) (concurring opinion) (emphasis added). The highest classification which can fairly be accorded to the "information" which Judges Bazelon and Edgerton said the prosecution should have furnished is that it is "speculative" in an ultimate degree.

Perhaps a "footnote" to this case may not be out of order in relation to the time this court has taken to resolve issues which lead to commanding a new trial:

> February, 1959 – date of the alleged criminal acts;
>
> November 1, 1962 – Appellant was indicted;
>
> May 10, 1963 – conviction by jury for grand larceny;

June 30, 1964 – the conviction was affirmed per Judges Washington and Bastian (Bazelon dissenting), *Levin v. United States,* 119 U.S. App.D.C. 156, 338 F.2d 265 (1964);

February 1, 1965 – a petition for writ of certiorari was denied by the Supreme Court, 379 U.S. 999 (1965);

February 25, 1965 – Appellant filed a petition for a writ of habeas corpus which was denied by the District Court on June 11, 1965, 249 F. Supp. 225 (D.D.C. 1965);

December 23, 1965 – this court reversed and remanded the case, *Levin v. Katzenbach,* 124 U.S.App.D.C. 158, 363 F.2d 287 (1966), and took the extraordinary step – one never taken before – of releasing him from prison while the habeas corpus claims were being reconsidered;

October 25, 1966 – the District Court resolved the remand question and the case returned here again, *Levin v. Katzenbach,* 262 F. Supp. 951 (D.C.C. 1966);

November 15, 1967 – this court again reversed ordering a new trial and I dissented, *Levin v. Clark,* No. 20,682(D.C. Cir., November 15, 1967).

The action of this court ordering a new trial was – and is – a gross miscarriage of justice which puts on the Government the burden of retrying a case on facts which occurred in February of 1959. Understandably the Government moved for rehearing *en banc* on January 10, 1968; this court's action on that petition alone has added approximately one year's delay.

The prosecution is now confronted with trying to reconstruct its case nearly 9 years after the event. The public should be pardoned if it loses confidence in the

administration of criminal justice when it takes this long for the judicial process to dispose of a simple criminal case – and then only to order a new trial in circumstances where such trial will take place nearly a decade after the crime.

APPENDIX S

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 21,974

RUDOLPH N. THORNTON,
Petitioner

v.

HONORABLE HOWARD F. CORCORAN,
Respondent

On Petition for Writ of Mandamus

Decided January 3, 1969

Mr. Allan M. Palmer for the petitioner.

Mr. Roger E. Zuckerman, Assistant United States Attorney, with whom *Messrs. David G. Bress,* United States Attorney, and *Frank Q. Nebeker,* Assistant United States Attorney, were on the opposition to the petition.

Mr. Sidney Edelman filed a brief on behalf of Saint Elizabeths, as amicus curiae.

Mr. William H. Allen filed a brief, as amicus curiae. *Mr. William A. Dobrovir* was also on the brief, as amicus curiae.

Before BAZELON, *Chief Judge*, BURGER and ROBINSON, *Circuit Judges.*

* * *

United States Court of Appeals
for the District of Columbia Circuit

No. 21,974 — September Term, 1968

Rudolph N. Thornton,
Petitioner

v.

Honorable Howard F. Corcoran,
Respondent.

Grand Jury 859-68
(Criminal 884-68)

[Filed Oct. 17, 1968]

Before: Bazelon, Chief Judge; and Burger and Robinson, Circuit Judges, in Chambers.

ORDER

In the above-entitled case, this Court on September 20, 1968, filed a memorandum order designed to avoid delay, while the petition for writ of mandamus was pending decision in the proceedings in petitioner's criminal case. As the memorandum order stated, this Court was "confident that the situation can be promptly and adequately rectified" in the District Court. This Court having now been informed that further steps have not been promptly taken to rectify the misunderstanding which has occurred, resulting in a failure to hold the staff conference which Saint Elizabeths Hospital assured this Court would be held if its motion for relief from the July 9, 1968, order of this Court were denied, it is

ORDERED by the Court, *sua sponte,* in the interest of expediting the proceedings, that the aforesaid memorandum order of September 20, 1968, be modified to direct the District Court (1) to proceed forthwith and without any further delay whatsoever to cause the petitioner to be placed in the same position he was in prior to the certification by the hospital authorities to the District Court that he was competent to stand trial, and (2) to direct

that the hospital proceed forthwith in accordance with the representation contained in its amicus curiae brief, which this Court relied upon, to accord to petitioner a staff conference, with the incidents directed in this Court's order of July 9, 1968. This order does not contemplate the further commitment of petitioner to Saint Elizabeths Hospital except for whatever minimum period is required to conduct the staff conference.

The Clerk of this Court shall issue forthwith a certified copy of this order to the District Court.

Per Curiam.

Circuit Judge Burger did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 21,974 **September Term, 1968**

Rudolph N. Thornton,
Petitioner

v.

[Filed Nov. 18, 1968]

Honorable Howard F. Corcoran,
Respondent

BURGER, *Circuit Judge, dissenting:* I dissent from the foregoing order (which was entered during my absence and without notice to me). I dissent because this court is totally without lawful power or authority to order or direct St. Elizabeths Hospital on the matter of holding or not holding a staff conference; or on how it is to conduct the internal diagnostic processes on which the Superintendent may rely in carrying out his statutory duties relating to the determination of competency to stand trial.

Congress has by statute[1] vested exclusively in the Superintendent of St. Elizabeths Hospital the duty to certify whether an accused is competent to stand trial; the District Court is not bound by that certification; criteria for that determination are not in issue. The certifying power is vested in an official person, the Superintendent, not his staff. The diagnostic process and internal administrative steps by which the Superintendent informs himself in the performance of his statutory duty is a medical matter totally beyond the power and surely beyond the competence of judges of this court or any court. The Superintendent of St. Elizabeths may reach his conclusions by reading the medical record, by personally interviewing the accused by consulting with staff members or any other means which in his professional judgment as a physician seem proper.[2] Indeed a very large number of such certifications are made by the Superintendent without any staff conference being held.[3] His certificate can,

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[1] 24 D.C. Code 301(b) (1967).

[2] The internal diagnostic process is not dissimilar to the institutional decisions rendered by administrative agencies which have consistently withstood Constitutional attack. *E.g.*, United States v. Morgan, 313 U.S. 409 (1941); Morgan v. United States, 304 U.S. 1 (1938); *cf.* Morgan v. United States, 298 U.S. 468, 481 (1936). In the *Morgan* cases the Supreme Court insulated the administrative process from indiscreet visitations by the unfriendly eye. The principle of the *Morgan* cases applies with added force here since a staff conference is not in any sense a hearing of an adjudicatory nature. *See also* Hannah v. Larche, 363 U.S. 420 (1960).

[3] It seems clear, and indeed there have been no express contentions to the contrary, that the holding of a medical staff conference at St. Elizabeths Hospital lies entirely within the *discretion* of the hospital Superintendent and that the need for such a conference has traditionally been determined on a case by case basis. "Of some 570 reports made to the courts of the District of Columbia since January 1, 1968 with respect to persons committed under 24 D.C. Code 301, 300 reports were made after a staff conference and approximately 270 were made without a staff conference." (Supplemental Memorandum for Saint Elizabeths Hospital, *Amicus Curiae*, at 6; *accord, id.* n. 4)

of course, be challenged and he can be cross-examined in the District Court hearing; any alleged infirmities in his diagnostic process may be explored.

To me it is not simply irregular for judges to instruct physicians on how they should make a diagnosis; in my view the order entered by Judges Bazelon and Robinson on October 17, 1968 commanding the Superintendent of St. Elizabeths Hospital to hold a conference and make a tape recording of that conference was a flagrant abuse of judicial power.[4] Except for the fact that the issue was probably moot as a practical matter when that order was

---

[4]The Court's order was tantamount to a writ of mandamus since it commanded the District Court to direct the hospital to conduct a medical staff conference. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction. . . ." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). The issuance by an appellate court of a mandamus against a District Court is erroneous in the absence of any substantial allegation of a usurpation or flagrant abuse of power. *Compare* Will v. United States, 389 U.S. 90 (1967), *with* Schlagenhauf v. Holder, 379 U.S. 104 (1964). "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' " *Id.* at 112, quoting Parr v. United States, 351 U.S. 513, 520 (1956). "(T)he fact this case involves a criminal prosecution has contextual relevance" which further militates against the use of mandamus. Will v. United States, *supra*, at 100 n. 10. Of equal importance is that courts will not interfere by way of mandamus except to enforce merely ministerial acts required by law to be performed. *See* note 3 supra.

entered[5] and is perhaps legally moot now,[6] I would move this court, *en banc*, to vacate and set aside the order of October 17, 1968.

All of the orders entered in this case arise out of Petitioner's desire to have his counsel present at the Medical Staff Conference and he relies heavily on *Gilbert v. California*, 388 U.S. 263 (1967) and *United States v. Wade*, 388 U.S. 218 (1967). It is clear, however, that those decisions and other right-to-confrontation cases are totally inapposite. Noting that "the requirements of due process frequently vary with the type of proceeding involved" the Supreme Court, in *Hannah v. Larche*, 363 U.S. 420, 440 (1960), concluded that the right to confrontation did not apply to investigations conducted by the Civil Rights Commission. As in *Hannah*, the Medical Staff Conference here

> is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short. . .(it) does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts. . . .
>
> * * *

---

[5]On July 30, 1968 the Superintendent of St. Elizabeths Hospital fulfilled his statutory duty under 24 D.C. Code 301(b) (1967) when he filed a certificate advising that the Defendant was competent to stand trial.

[6]We have been informed that, pursuant to this Court's most recent order, St. Elizabeths Hospital on October 24, 1968, at 10:30 A.M. held a medical staff conference which was recorded on audio tape. Supplemental Memorandum for St. Elizabeths Hospital, *Amicus Curiae*, at 2.

> [I]t investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action *de novo*.

Id. at 441, 452. (Emphasis supplied.)

There is no legal basis for equating a Medical Staff Conference to a "confrontation" either in the traditional sense or within the meaning of *Wade-Gilbert*. Those cases apply only to critical prosecutive stages. The vice of requiring a sensitive diagnostic process to be conducted as though it were an adversary matter seems too obvious to need discussion. The value of that process is undermined by anything which inhibits the free exchange of views; the integrity of the process makes privacy imperative. The presence of a lawyer for the patient at a staff conference would obviously inhibit the free expression and exchange of ideas which normally occurs. The check on the processes by which the Superintendent of the Hospital reaches his conclusion is the power to cross examine him.

The legal method of inquiry is unsuited to the medical investigation to be conducted. Medical diagnostic procedures should not be inhibited by non-medical notions of procedural "due process." Indeed it is far more consonant with the sympathetic relationship existing between Doctor and patient that the medical inquiry be divested as much as possible of an adversary character. Our approach should encourage an attitude of cooperation rather than partisanship; emphasis must be on the common pursuit for an objective, uninhibited inquiry, uncluttered by the techniques and devices of the courtroom.

SUPREME COURT, U. S.

FILED
MAY 9 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1276

WILLIAM H. ROBERTS, *Petitioner,*

v.

WILLIAM J. McDONALD

and

THE CATHOLIC UNIVERSITY OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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FEDERAL RULES OF CIVIL PROCEDURE:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

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WILLIAM H. ROBERTS, *Petitioner,*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and Orders of the United States District Court for the District of Columbia, and the unreported Per Curiam decision of the United States Court of Appeals for the District of Columbia Circuit are set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether a question of national importance is presented by the denial in the United States District Court for the District of Columbia of the petitioner's motion for a preliminary injunction wherein he sought to enjoin the respondent Catholic University of America from implementing a resolution of its Academic Senate to dissolve an academic unit and transfer its faculty, students and degree programs to another department of the University.

STATEMENT OF THE CASE

Petitioner William H. Roberts is an Ordinary Professor of the faculty of the respondent Catholic University of America, having taught in the field of International Law and Relations prior to January, 1956, in the University's Department of Politics which he headed (JA 280, 281), and which was a department under the jurisdiction of the Graduate School of Arts and Sciences.

On January 25, 1965, the University's Board of Trustees approved the establishment of an Institute of International Law and Relations as separate and distinct from the Department of Politics and the appointment of Dr. Roberts as Director thereof (JA 274-275). Pursuant to the terms of the Trustees' resolution, a meeting was held on February 5, 1965, of the various department heads and deans affected thereby to discuss the implementation of the establishment of the Institute, including the academic, administra-

tive, coordinative and other factors involved. The minutes of this meeting were signed by all those present (JA 247-261).

Subsequently, the Institute was, in fact, established and Dr. Roberts was appointed Director (JA 282). On May 25, 1966, Dr. Roberts filed the case at bar, a suit for damages against the University and its Rector (JA 11).

On October 26, 1967, the Academic Senate of the University (composed of the deans and certain faculty members [JA 217]) passed a resolution recommending the dissolution of the Institute on the basis of various policy, academic and administrative considerations which had been experienced, and recommending the transfer of its functions back to the Department of Politics of the Graduate School of Arts and Sciences (JA 276-278). On November 2, 1967, Dr. Roberts sought to restrain the implementation of this resolution in his amended motion for a preliminary injunction (JA 64). The motion was argued fully before Judge John J. Sirica (JA 444-496), who denied said motion, entering findings of fact, conclusions of law and an appropriate order on November 21, 1967 (JA 534-541). Notice of Appeal was filed by Dr. Roberts on November 28, 1967 (JA 544).

Dr. Roberts then filed in the United States Court of Appeals for the District of Columbia Circuit a motion for injunction pending appeal, which was argued before Judges Burger, Tamm, and Robinson. This motion was denied by a unanimous order dated January 12, 1968 (JA 546). Similar relief was denied petitioner in this Court by Chief Justice Warren on January 30, 1968 (JA 547).

Appellant then filed in the District Court a second amended motion for a preliminary injunction, which was heard by Judge George L. Hart, at which hearing testimony was received (JA 499-533). Judge Hart found that Dr. Roberts had failed to make any showing that he was entitled to the extraordinary relief he requested, and denied said motion (JA 542-543). A Notice of Appeal was filed by Dr. Roberts on February 15, 1968 (JA 545), and the two appeals were consolidated by order of the Court of Appeals dated April 3, 1968.

Subsequent to the conclusion of Dr. Roberts' unsuccessful quests for injunctive relief pending appeal, the Institute was dissolved. Its functions, degree programs, faculty and students were transferred back to the University's Graduate School of Arts and Sciences (Department of Politics) in February, 1968, at the commencement of the second semester of the 1967-1968 academic year.

The issues argued in the Court of Appeals focused on the respondents' claim of mootness of the appeal, as well as the traditional issues involved in the review of a District Court's findings of fact, conclusions of law, and Order invoking its discretion in the denial of a motion for a preliminary injunction. As shown in Appendix B, the Court of Appeals did not reach the question of mootness, inasmuch as it found the findings of the District Court were beyond serious challenge under Rule 52, Federal Rules of Civil Procedure, and that the denial of the injunction by the District Court was amply within the bounds of said judicial discretion.

ARGUMENT

I

The Decision Below Is Clearly Correct

The petitioner's quest for a preliminary injunction involved the exercise of the discretion of the District Court. The scope of review involved in an appeal from the denial of a preliminary injunction under District of Columbia law is limited, it being settled in that jurisdiction that such a denial will not be set aside except for clear error or an abuse of discretion. This principle was adhered to in *Cox* v. *Democratic National Committee,* 91 U.S. App. D.C. 416, 200 F.2d 356 (1952), *Young* v. *Motion Picture Assoc. of America,* 112 U.S. App. D.C. 35, 37, 299 F.2d 119, 121, Cert. denied 370 U.S. 922 (1962), and was commented upon in *Maas* v. *United States,* 125 U.S. App. D.C. 251, 371 F.2d 348 (1966).

Moreover, under District of Columbia law, a heavy burden is imposed upon one to demonstrate that findings of fact are "clearly erroneous" under Rule 52 of the Federal Rules of Civil Procedure. See *Belleview Gardens, Inc.* v. *Hill,* 111 U.S. App. D.C. 343, 297 F.2d 185 (1961). The statement of the Court of Appeals that the findings are ". . . beyond serious challenge . . ." was an understatement, when it is seen that the findings are based directly upon unimpeached exhibits in the record.

The record discloses that the findings of fact numbered 1, 2 and 3 deal with the position of Dr. Roberts, the University, and the Statutes of the University, and are based upon the amended complaint (JA 11, 12) and the Statutes (JA 211-213). Findings numbered 4, 5, 8, 9 and 10 are concerned with Dr. Roberts'

various appointments, following his positions up to the time of the hearing, and are based directly upon exhibits in the record (JA 280-283). Findings numbered 6 and 7 relate to the establishment of the Institute of International Law and Relations, and are based upon the Resolution of the Board of Trustees of January 21, 1965 (JA 274) and the minutes of the meeting of the appropriate faculty members held to discuss the implementation of the establishment of the Institute (JA 247-261). Findings numbered 11 and 12 detailed the resolution of October 26, 1967, of the Academic Senate recommending the dissolution of the Institute and the transfer of its functions, as well as the notice thereof to Dr. Roberts, and were based directly upon documents in the record (JA 276-278, 284).

The conclusions of law are similarly sound, involving legal inferences from the documents and the familiar principle of local law that the courts will not interfere with the internal operations of corporations or organizations where the challenged actions of said bodies are within the constitutions, rules or by-laws of such organizations. *DeYturbide* v. *Metropolitan Club,* 11 App. D.C. 180 (1897); *United States ex rel Johnson* v. *First Colored Baptist Church,* 56 App. D.C. 324, 14 F.2d 296 (1926); and *Poirier* v. *Welch,* 233 F. Supp. 436, 439 (D.C.D.C., 1964).

The conclusion of law commenting upon petitioner's failure to make a showing of irreparable injury is also valid. Petitioner still enjoys his tenure at the University, teaching in the field of International Law and Relations. The dissolution of the Institute and the transfer of its functions involved only an administrative change in an attempt to solve the various

academic and administrative problems which had been experienced and become manifest during the life of the Institute. Dr. Roberts, the faculty, students and degree programs formerly in the Institute were merely to be transferred to the Department of Politics of the Graduate School of Arts and Sciences (JA 294-296). No one was to be dismissed, and no one was to be irreparably damaged or prejudiced by the dissolution.

Thus, the trial court's exercise of its discretion cannot be challenged, particularly in view of the traditional principles that equity will decline to specifically enforce a personal service contract where the remedy is not mutual. See *Roller* v. *Weigle,* 49 App. D.C. 102, 261 Fed. 250 (1919) and *Tucker* v. *Warfield,* 73 App. D.C. 278, 119 F.2d 12 (1941). Moreover, if the Court had granted the relief requested by petitioner, it would have not only invaded the internal operations of the University, but would have continued a situation which had been found to be academically and administratively unsound by learned University deans and scholars, in a field foreign to the expertise of the trial court.

II

There Are No Special and Important Reasons for Granting the Writ of Certiorari

As shown above, this case turns upon the application of the local law of the District of Columbia on the question of whether a preliminary injunction should issue upon the particular facts of this case. This Court has on many occasions commented to the effect that it will not ordinarily review the decisions of the United States Court of Appeals for the District of

Columbia Circuit in cases which are based upon the statutes or common law of the District of Columbia. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285 (1935), *District of Columbia* v. *Pace,* 320 U.S. 698, 702 (1944), *Busby* v. *Electric Utilities Employees Union,* 323 U.S. 72, 74-75 (1944) and *Fisher* v. *United States,* 328 U.S. 463, 476 (1946).

This case is of no importance save to the parties. It concerns no national issue. It involves only a discretionary decision based upon local law and the particular facts involved, and will not serve as a precedent, particularly in view of the fact that the opinion of the Court of Appeals was unprinted and unreported. Once concluded, the case will lack further significance. A grant of the writ of certiorari here would only serve to invite litigants to seek review of the thousands of discretionary rulings made by District Courts upon injunction cases, and the discretionary rulings of the Courts of Appeals upon procedural questions while in the appellate stage, unrelated to the essential holding in the case. Members of this Court have noted that "the litigous tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three Courts, lead to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest Court of the land". See Mr. Justice Frankfurter, dissenting in *Dick* v. *New York Life Insurance Co.,* 359 U.S. 437, at 459 (1959). The respondents submit that this is such a case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ME COURT, U. S.

MAY 22 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

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FILED
MAY 22 1969
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No. 1276

WILLIAM H. ROBERTS,
Petitioner,

v.

WILLIAM J. McDONALD
and
THE CATHOLIC UNIVERSITY OF AMERICA,
Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI. (FILED APRIL 17, 1969)

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI (FILED APRIL 17, 1969)

I.

INTRODUCTORY STATEMENT

The Respondents attempted in their Brief in Opposition to the Petition to confuse the issues by completely disregarding *all* questions raised by Petitioner. In their aforesaid attempt to bypass rather than to join the issues before this Court, the Respondents' Brief wished to create the impression that the Petition had been primarily intended to show that the decision below was erroneous. A comparison of the questions presented by Petitioner (Pet. pp. 2-3)[1] and the revised questions presented in the Brief for Respondents in Opposition (Resp.

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[1] The petition for a Writ of Certiorari is referred to herein as "Pet." and the Brief for Respondents as "Resp. B."

B. p. 2) show clearly that the Respondents completely misconceived the thrust of the Petition.

The Reply Brief will primarily be directed to showing (a) that the new issues raised by the Respondents are immaterial and (b) that there are special and important reasons for granting the Writ of Certiorari.

II.

THE DECISION BELOW SANCTIONED SUCH AN ABUSE OF DISCRETION BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

1. The Respondents attempt to convey the impression that the scope of review involved in an appeal from the denial of a preliminary injunction is more limited under District of Columbia law than in other jurisdictions which apply the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In addition, the Respondents attempt to imply that District of Columbia law imposes a particularly" . . . heavy burden . . . upon one to demonstrate that findings of fact are 'clearly erroneous' under Rule 52 of the Federal Rules of Civil Procedure," (Resp. B. p. 5). However, in *Maas v. United States,* 371 F.2d 348, 351 (D.C. Cir. 1966), on which the Respondents rely in their Brief, the Court of Appeals stressed the point that its practice on procedural issues did not differ from the practice of other courts of appeals. However, the Respondents admitted that

> ". . . such a denial [of a preliminary injunction] will not be set aside except for clear error or *an abuse of discretion*" (Resp. B. p. 5) (emphasis added).

The cases cited by the Respondents in this connection show clearly that District of Columbia law and federal

law regarding the scope of review and the burden imposed under the "clearly erroneous" rule pursuant to Rule 52, *Fed. R. Civ. P.* are identical with each other. In *Cox v. Democratic Central Committee, of the District of Columbia,* 200 F.2d 356, (D.C. Cir. 1952) the Court of Appeals said that:

> "It is settled law that *a* Court of Appeals will not set aside the action of *a* District Court in either denying or granting an application for a preliminary injunction unless the action of the District Court was in clear error or *in abuse of discretion*" (emphasis added).

Clearly, in the aforesaid case the Court of Appeals did not intend to fashion a particular local rule but stated simply the settled law generally applied by federal courts of appeal.

The Respondents also relied on *Maas v. United States, supra* where the Court of Appeals stated that:

> "Appellate courts *quite generally* view the grant or denial of a preliminary injunction as resting in the *sound* discretion of the trial court, and limit determination on appeal to whether there has been *'abuse of trial court discretion'*, 'clear error,' 'violation of the rules of equity,' or 'improvident granting' " (emphasis added).

It has been aptly stated that

> "In disturbing a district court's findings of basic facts, this court is guided by the 'clearly erroneous' provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not only to basic facts, but as to what inference (*i.e.*, ultimate fact) should reasonably be derived from the basic facts." *Sears, Roebuck & Co. v. Johnson,* 219 F.2d 590, *591*, (3 Cir. 1955). See also *Bullock v. Tamiami Trail Tours,*

Inc., 266 F.2d 326, 330 (5 Cir. 1959); *Bullen v. De Brettville*, 239 F.2d 824 (9 Cir. 1956); *Galena Oaks Corp. v. Scofield*, 218 F.2d 217, 219 (5 Cir. 1954)..

2. The Respondents also attempted in their Brief to confuse the issues before this Court by making it appear that Petitioner had filed only one Motion for a Preliminary Injunction. In fact, Petitioner had filed two such motions (R. 160-161; 206-207) which were based on entirely different grounds (Pet. pp. 6-7). In addition, Petitioner's second Motion presented new and previously undiscoverable facts (R. 428-440).

The Court of Appeals disregarded completely the fact that the District Court, in its Order of February 8, 1968 (Pet. p. 12a), denying Petitioner's second Motion, failed to file *any* findings of fact or conclusions of law as required by Rule 52(a) of the *Fed. R. Civ. P.* The District Court found it sufficient to say that ". . . plaintiff has failed to make any showing that he is entitled to the extraordinary relief requested . . ." (Pet. p. 12a). Similarly, in its oral remarks on Petitioner's second Motion, the District Court simply said that:

> "I find nothing in the second amended motion that would change the situation as it existed when Judge Sirica ruled and the Court of Appeals ruled on the request to keep the matter in status quo" (Pet. p. 13a).

Clearly, the District Court failed in its aforesaid Order and in its oral remarks to give any indication of the ". . . findings of fact and conclusions of law upon which it predicates its action" *Bateman v. Ford Motor Co.*, 310 F.2d 805, 806, 807 (3 Cir. 1962). Even if the aforementioned oral remarks of the District Court and its aforesaid Order denying Petitioner's second Motion should be considered to imply a reference to the Findings of Fact

and Conclusions of Law filed by the District Court with its Order denying Petitioner's first Motion (Pet. pp. 7a-11a), as they do not, the District Court in its oral remarks and its Order of February 8, 1968 still disregarded the fact that the grounds on which the second Motion had been based were "... fundamentally different from those on which Petitioner had relied in his first Motion" (Pet. p. 7). In addition, and as heretofore stated, Petitioner submitted with his second Motion previously undiscoverable material (R. 428-440) which related to the grounds on which Petitioner's first Motion had been based. Therefore, the oral remarks made by the District Court on February 2, 1968 (Pet. p. 13a) and its Order of February 8, 1968 (Pet. p. 12a) were clearly not in conformity with the requirements of Rule 52(a) *Fed. R. Civ. P.* See *Kelley v. Everglades Draining District,* 319 U.S. 415, 420, 421 (1941); *Dalehite v. U.S.,* 346 U.S. 15, 24 n. 2 (1963); *Woods Construction Co. v. Pool Construction Co.,* 314 F.2d 405, 406 (10 Cir. 1963); *I.C.C. v. Cardinale Trucking Corp.,* 308 F.2d 435, 436, 437 (3 Cir. 1962); *Shannon v. Retail Clerks Protective Association,* 128 F.2d 553, 555 (7 Cir. 1942); *United States v. Forness,* 125 F.2d 928, 930 (2 Cir. 1942).

3. a. The Brief of the Respondents studiously disregards the disposition of Petitioner's second Motion for a Preliminary Injunction by the District Court and also the fact that the *per curiam* memorandum of the Court of Appeals (Pet. pp. 3a-5a) clearly failed to consider Petitioner's appeal from the denial of the aforesaid second Motion. Consequently, the Respondents direct their Brief exclusively to supporting the Findings of Fact and Conclusions of Law which the District Court had filed when it denied Petitioner's first Motion (Resp. B. pp. 5-6). The aforesaid Findings of Fact and Conclusions of Law (Pet. pp. 7a-11a) were a *verbatim* transcript of the clearly self-serving findings suggested by Respondents

which had been filed on November 13, 1967 (Pet. p. 8). Finally, the aforesaid Findings of the District Court were not only a transcript from the suggestions made by the Respondents but they were, in addition, based on an incomplete record (Pet. p. 8).

b. The Respondents believe that "The statement of the Court of Appeals that the Findings are '. . .beyond serious challenge. . .' was an understatement" because they were ". . .based directly upon unimpeached exhibits in the record" (Resp. B. p. 5). Even if the aforesaid statement in the Brief for Respondents were correct, as it is not, the decision below would sanction a gross abuse of discretion by the District Court because the aforesaid Findings were, in so far as they are not conclusions of law, mainly bare statements of ultimate facts and not findings of basic facts as required by Rules 52(a) *Fed. R. Civ. P.* This Court said in *Dalehite v. United States, supra,* that:

> "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the district court relied. *Kelley v. Everglades Draining District,* 319 U.S. 415, and cases cited. Otherwise, their findings are useless for Appellate purposes."

See also *Sears, Roebuck & Co. v. Johnson supra; Bullock v. Tamiami Trail Tours, Inc., supra.* In addition, the Court of Appeals sanctioned the District Court's abuse of discretion which had failed to base its conclusions of law properly on findings of basic facts. *Bullen v. De Brettville, supra.* Even if the District Court's Findings should erroneously have been considered to be findings of basic facts, these findings would clearly have been "induced by an erroneous view of law" 5 Moore's Federal Practice, (2d ed. 1967), Section 52.03 [2]; p. 2630. In addition, the District Court combined, as will be shown hereinafter,

findings of fact and conclusions of law. Therefore, even from this additional point of view, the findings of fact of the District Court were not binding on the Court of Appeals because there was error as to the law. 5 Moore's Federal Practice, *supra,* p. 2631.

Specifically, (i) Finding of Fact No. 3 (Pet. p. 7a) attempts to construe the Statutes of the Respondent University. It is well settled that the construction and/or interpretation of corporate charters and by-laws is a question of law and not a question of fact. In addition, the aforesaid "finding of fact" is not in conformity with Article 22 of the Statutes of the Respondent University (R. 342);

(ii) The Brief for Respondent, by paraphrasing Findings of Fact No. 7, asserts erroneously that the aforesaid Finding (Pet. p. 8a) related to ". . .the minutes of the meeting of the appropriate faculty members held to discuss the implementation of the establishment of the Institute. . ." (Resp. B. p. 6). Finding of Fact No. 7 was clearly erroneous because the minutes of the meeting of February 5, 1965 show that those in attendance were the principal executive officers of the University and the deans of the schools concerned (R. 374).

Clearly, the last sentence of Finding No. 7 is conclusory in nature. The Court of Appeals sanctioned a gross abuse of discretion by the District Court in approving the latter Court's failure to ascertain the basic facts on which it had based the conclusion that ". . .at said meeting, a plan for the implementation of the Trustees' actions were adopted by those in attendance." (Pet. p. 8a). In fact, the record shows that pursuant to a resolution of Respondent University's Board of Trustees, the purpose of the meeting was to reach ". . .an agreement of record in full acceptance of this [the Trustees'] authorization and approval of the agreements as reached in its implementation" (R. 384; 387).

(iii) Finding of Fact No. 9 (Pet. p. 8a) is conclusory in nature where it refers to the underlying exhibit (R. 410) as supplementing "Plaintiff's appointment." The District Court, when denying Petitioner's second Motion, and the Court of Appeals must have been aware of the fact that the history of the aforesaid exhibit gives rise to serious doubts as to its veracity (R. 431).

(iv) Conclusion of Law No. 1 (Petition 10a-11a) is, in fact, a bare conclusion of an ultimate fact. In the circumstances of the case, and in view of the record before it (R. 212; 504-506), the Court of Appeals sanctioned again the District Court's failure to comply with Rule 52(a), *Fed. R. Civ. P.* The sanctioning of the District Court's clear and gross abuse of discretion by the Court of Appeals is the more serious because the record shows that the Respondent University's Chancellor, Cardinal O'Boyle, stated in the meeting of the Executive Committee of the Board on January 21, 1965, that the resolutions about to be passed were intended to authorize the Respondent University's Rector ". . .to come to a *definitive* understanding. . ." with Petitioner (R. 444) (emphasis added). In addition, the record also shows the statement of the University's Rector that the establishment of the Institute, which included Petitioner's appointment as its Director, were "definite and final" (R. 384).

(v) Conclusion of Law No. 4 (Pet. p. 11a) is, in fact, a negative finding and is, therefore, *per se* not in conformity with Rule 52(a), *Fed. R. Civ. P.* If it is considered to be a conclusion, the District Court failed to find the basic facts on which the aforesaid negative conclusion was based.

(vi) Conclusion of Law No. 5 (Pet. p. 11a) is, if it is relevant at all, already inherent in the aforesaid Conclusion of Law No. 4.

Therefore, the following words of the court in *Woods Construction Co. v. Pool Construction Co., supra,* at 406 are fully applicable here:

> "The most that can be said of these findings is that each is either a conclusion of law, a bare conclusion of ultimate fact or a negative finding. The basic facts necessary to determine the issues in the case do not appear. . ."

c. In Conclusion of Law No. 3 (Pet. p. 11a), the District Court said:

> "That the Court does not have jurisdiction in this case to control the internal management of the University."

The Respondents stated (Resp. B. p. 6) that the aforesaid conclusion of law was sound:

> ". . .involving. . .the familiar principle of local law that the courts will not interfere with the internal operations of corporations or organizations where the challenged actions of said parties are within the constitutions, rules or by-laws of such organizations."

The Respondents rely in their Brief on *Poirier v. Welch,* 233 F. Supp. 436, 439 (D.C.D.C. 1964) where the Court said:

> "This Court may not substitute itself for the Board in determining matters of internal management of the corporation, *unless there is some violation of law or fraud*" (emphasis added).

In fact, Petitioner asserted and clearly showed that the Respondent University (i) had acted unlawfully by violating, to Petitioner's irreparable injury, the legal duties which it owed him pursuant to the contract of February 5, 1965; (ii) that, regardless of the aforesaid con-

tract, the Respondent University had acted unlawfully and to Petitioner's irreparable injury in maliciously, arbitrarily, recklessly and oppressively dissolving the Institute. Thus, the action of Respondent University constituted misconduct which, in view of the fiduciary relationship existing between the parties, was equivalent to a breach of trust. Consequently, the aforesaid acts of the Respondent University were *per se* an abuse of corporate discretion. See *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 264 (1917). See also *United Milk Products Corp. v. Lovell*, 75 F.2d 923, 927 (6 Cir. 1935); *Ashwander v. Tennessee Valley Authority*, 8 F. Supp. 893, 894 (N.D. Ala. 1934).

Poirier v. Welch, supra, on which the Respondents rely, also said that:

> "...this corporation...though principally a private corporation...has a public interest. The public...has an interest in its activities..."

Specifically, the student body of the Institute had matriculated in the aforesaid Institute in good faith and in reliance on the Respondent University's announcements (R. 489-559). The protection of the aforesaid students from arbitrary and willful action on the part of the Respondent University in dissolving the Institute on eleven weeks' notice and in the middle of an academic year is a public interest which *per se* removes the action of the Respondent University from the shelter of the immunity which the law extends only to lawful and legitimate internal operations of corporations and organizations. In this connection, this Court has said:

> "...that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel v. United*

States, 306 U.S. 153, 157 (1939). See also *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas RR Co.*, 363 U.S. 528, 532 (1960); 7 Moore, Federal Practice, *supra*, Sec. 65.04 [1], pp. 1628, 1629.

In claiming immunity for judicial review for the actions of Respondent University, the Respondents also attempt to rely on *United States ex rel Johnson v. First Colored Baptist Church*, 14 F.2d 296 (D.C. Cir. 1926) (Resp. B. p. 6). The aforesaid case deals with the ecclesiastical jurisdiction of the First Colored Baptist Church. In fact, the Court of Appeals said expressly in this connection that "No temporal rights of appellant are involved." Clearly, the Respondents have erroneously relied on the aforementioned case which has no bearing whatsoever on the instant proceedings.

4. The Respondents failed to make any reference to the record when they asserted in their Brief that:

> "The dissolution of the Institute and the transfer of its functions involved only an administrative change in an attempt to solve the various academic and administrative problems which had been experienced and become manifest during the life of the Institute." (Resp. B. 6-7)

In fact, the Record shows that the first attempts to destroy the Institute were made on February 21, 1965, *i.e.*, sixteen days after the agreement of February 5, 1965, had been signed and nearly seven months prior to the commencement of the Institute's operations (R. 321-325). Therefore, the attempted dissolution was in no way related to ". . .problems which had been experienced and become manifest during the life of the Institute" (Resp. B. p. 7). The actual reason for the attempted dissolution of the Institute was stated by the Executive

Vice President of the Respondent University when he said that "Anyway, if we had waited longer, the Institute would have become too strong to be disestablished" (R. 481).

5. The Respondents make another attempt to confuse the issues when they advance their ever-repeated argument "...that equity will decline to specifically enforce a personal service contract where the remedy is not mutual." (Resp. B. p. 7) Clearly, the very attempt of the Respondent University to dissolve the Institute shows that the underlying contract is not a personal service contract. In addition, it is well settled that mutuality of remedy is not necessary (a) "in cases of enforcement by injunction" 5A Corbin on Contracts, Sec. 1188; and (b) "in cases where the decree can properly be made contingent on performance by the plaintiff" Corbin, *supra*, Sec. 1190.

III.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Respondents assert that

> "This court has on many occasions commented to the effect that it will not ordinarily review the decisions of the United States Court of Appeals for the District of Columbia Circuit in cases which are based upon the statutes or common law of the District of Columbia" (Resp. B. pp. 7-8).

However, the Respondents failed to say that the cases upon which they relied, qualify essentially and narrow severely the aforesaid general statement. In *Fisher v. United States*, 328 U.S. 463, 476 (1946) this Court said:

> "Our policy is not to interfere with the local rules of law which they [the Court of Appeals for the

> District of Columbia] fashion, *save in exceptional situations where egregious error has been committed*" (emphasis added).

In *Del Vecchio v. Bowers,* 296 U.S. 280, 285 (1935) this Court said:

> "We will not *ordinarily* review decisions of the U.S. Court of Appeals [of the District of Columbia]..." (emphasis added). See also *District of Columbia v. Pace,* 320 U.S. 698, 702 (1944).

The Petitioner submits that he has presented to this Court an extraordinary and exceptional situation in regard to which he has, *inter alia,* invoked the supervisory powers of this Court. The aforesaid supervisory powers over courts of appeal have even been exercised by this Court when the rights of the parties were not as gravely injured and impaired as, in effect, they are in the instant case. In this connection the following words of this Court apply:

> "The injury is not limited to the Defendant-there is injury...to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States,* 329 U.S. 187, 195 (1946).

Commenting on this case it has been said that

> "Clearly, therefore, the reviewing court may, under the supervisory powers, shift its focus from the adjudication of the parties' rights to a more general investigation of judicial procedures affecting a more comprehensive kind of supervision than had seemed possible under earlier doctrines." Note, The Supervisory Power of the Federal Courts, 76 Harvard Law Review 1656, 1657 (1963).

Clearly, this is more the case if the questions, as in the instant case, are presented "...in the context of meaningful litigation" *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 188, 184 (1959).

Also, the supervisory powers of this Court have always been exercised whenever a "...threat to the goal of uniformity of federal procedure [was] posed by the decision below..." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

2. The Respondents urge upon this Court that the Writ be denied because

> a. "This case is of no importance save to the parties" (Resp. B. p. 8). Clearly, this statement of the Respondents has no foundation in the record which shows exactly the contrary, namely that approximately 100 faculty members and students are involved (R. 456-563).
>
> b. "It [the case] involves only a discretionary decision based upon local law and the particular facts involved and will not serve as a precedent particularly in view of the fact that the opinion of the Court of Appeals was unprinted and unreported."

As far as the first part of the aforesaid sentence is concerned, the Respondents seem to have overlooked the fact that the Petition (pp. 6-15) submitted questions which pertain to the construction of federal rules of procedure by the District Court for the District of Columbia and by the Court of Appeals. As heretofore stated on this page, the questions which were raised in the Petition have a direct and immediate bearing on "...the goal of uniformity of federal procedure..." *Hanna v. Plumer, supra,* regardless of whether or not the Court of Appeals acted in its capacity as a federal court

or in its local capacity. In fact, the Court of Appeals has been clearly aware of the fact that its practice in questions of federal procedure is of national importance regardless of whether it acts on an appeal from a decision of the District Court in its federal or in its local capacity.

In addition, and, specifically, in regard to the questions raised by Petitioner as to the conformity of the General Rules of the Court of Appeals with the Federal Rules of Appellate Procedure, this Court has regularly granted writs of certiorari when, as in the instant case, "...a considerable number of suits are pending in the lower courts which will turn on resolution of these issues..." *Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States,* 377 U.S. 235, 237 (1964).

In regard to the second part of the aforementioned sentence in the Brief for Respondents, namely that "It [the case]...will not serve as a precedent, particularly in view of the fact that the opinion of the Court of Appeals was unprinted and unreported," the Respondents seem to suggest to this Court that the determination of a court of appeals as to whether an opinion shall be printed or not should guide this Court in granting or denying a writ of certiorari. If this point of view were accepted, courts of appeals would arrogate to themselves the power to preempt or, at least, to influence this Court's prerogatives in granting or denying writs of certiorari.

c. Finally, Petitioner submits that today the question of the scope of immunity of colleges and universities from judicial review, which the instant case raises, is also of national importance.

d. Finally, the Writ should be granted because the questions raised in the Petition are "fundamental to the

future conduct of the case" *United States v. General Motors Co.*, 365 U.S. 373, 377 (1945). See also *American Construction Co. v. Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372, 384 (1892).

CONCLUSION

The instant case manifestly involves

a. Important federal questions which have not been, but should be, settled by this Court; b. A decision by the Court of Appeals which is clearly in conflict with applicable decisions of this Court and the decisions of other courts of appeals on the same matter; c. Special and important reasons for exercising this Court's supervisory powers over the Court of Appeals; d. A clear-cut and fundamental issue of law, namely that of the scope of immunity of universities from judicial review; e. Departure from the accepted and usual course of judicial proceedings by sanctioning the abuse of discretion by the District Court.

Accordingly, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM H. ROBERTS
Petitioner *pro se*

JUL 11 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term 1968

No. 1,276

WILLIAM H. ROBERTS,
Petitioner,

v.

WILLIAM J. McDONALD
and
THE CATHOLIC UNIVERSITY OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

WILLIAM H. ROBERTS
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Washington, D. C. 20016
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Supreme Court of the United States

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WILLIAM H. ROBERTS,

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THE CATHOLIC UNIVERSITY OF AMERICA,

Respondents.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its Order of June 16, 1969, denying the Petition for Writ of Certiorari————————U.S.————————(1969) and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled case as prayed for in the Petition filed April 17, 1969, herein.

Petitioner requests rehearing of the aforesaid Order of this Court

(1) On the ground that Petitioner presents the following question which was not presented in the original Petition for a Writ of Certiorari, namely:

Whether the Court of Appeals in affirming the denial of Petitioner's Motion by the District Court on grounds different from those on which the District Court had relied but which were not based either on findings of fact by the District Court, or on facts found by the Court of Appeals in *de novo* review, and/or without adequate references to specific facts in the record before the Court of Appeals, departed from the accepted and usual course of judicial proceedings to such a degree as to call for an exercise of this Court's power of supervision pursuant to Rule 19 of its Rules;

(2) On the ground of new and conflicting decisions by other courts of appeals.

REASONS FOR GRANTING PETITION FOR REHEARING

I

Presentation of New Question

1. ARGUMENT:

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS IN AFFIRMING THE ORDERS OF THE DISTRICT COURT DENYING PETITIONER'S MOTIONS FOR A PRELIMINARY INJUNCTION RELIED ON GROUNDS WHICH CONSISTED OF "A SERIES OF ESTIMATES" OF AN "INTANGIBLE NATURE" *Perry v. Perry,* 190 F.2d 601, 602 (D. C. Cir. 1951) WHICH HAVE NO FOUNDATION IN THE FINDINGS OF FACT BY THE DISTRICT COURT, OR BY THE COURT OF APPEALS IN *DE NOVO* REVIEW, AND/OR IN THE RECORD BEFORE THE COURT OF APPEALS.

2. Since this Court's jurisdiction over the instant case has been established by a timely Petition for Writ of Certiorari "questions not presented in the original petition are not foreclosed upon rehearing" Stern and Gressman, Supreme Court Practice (3rd Ed. 1962), 390. See also Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction, 46 Columbia Law Review, 255, 263 (1946).

3. (a) In his Amended Motion for Preliminary Injunction, filed on November 2, 1967 (R. 190-191) (hereinafter "first motion") Petitioner relied (i) on the well-established doctrine that equity courts will grant relief to prevent a party to a contract from either incapacitating itself from performing the contract, or from interfering with the other party's performance of the contract; (ii) on the well established doctrine that equity courts will protect public interests, specifically, in the instant case the public interest in protecting the Institute's students from being deprived of rights and privileges as third-party beneficiaries and/or as parties to their respective matriculating contracts with the University.

(b) On January 23, 1968, Petitioner filed a second Amended Motion (R. 206-207) (hereinafter "second motion") in which he relied on *additional* and *different* facts and evidence which had not previously been available (R. 428-439); and *in addition* to the aforementioned grounds on which the first motion had been based, on the well-established doctrine that equity courts will exercise their power to prevent (i) frustration of litigation (R. 434-439); and (ii) impending injury resulting from malicious, arbitrary, reckless and oppressive acts done in bad faith (R. 209-212; 436-444).

4. In the hearing on the first motion, Judge Sirica stated on November 9, 1967, the District Court's *own* considerations leading to denial of Petitioner's motion. Judge Sirica said:

> "There are some very interesting questions. I think what you have here if you can prove what you say is an action for breach of contract – breach of fiduciary duty. That case is not before this Court. The only thing that is before me now is a motion for preliminary injunction. . . . *I don't think I should at this point intervene in the internal affairs of the university. I think that is what I would be doing if I ordered the preliminary injunction.* . . ." (R. 623) (emphasis added).

On the other hand, the "findings of fact and conclusions of law" filed on November 21, 1967 (Pet. pp. 7a-11a) are not the District Court's *own* considerations but they are merely a verbatim and mechanical adoption of the findings of fact and conclusions of law drafted by the Respondents (R. 663-669). In this connection, it has been aptly said that:

> "We have recently asked for 'brief and pertinent findings of contested matters. . . rather than the argumentative. . . documents prepared by winning counsel.' Otherwise we lose the benefit of the Judge's own considerations." *U.S. v. Forness*, 125 F.2d 928, 930 (2 Cir. 1942).

5. In the hearing on the second motion, Judge Hart stated on February 2, 1968, that

> "I find nothing in the second amended motion that would change the situation as it existed when Judge Sirica ruled. . . . " (Pet. p. 13a).

Clearly, the District Court disregarded here the fact that the second motion had not only been based on additional and new facts and evidence, but also on grounds which were different from those on which Petitioner had relied in his first motion (p. 3, *supra*). Consequently, the District Court failed in gross violation

of the mandatory provision of Rule 52(a), *Fed. R. Civ. P.* to file any findings of fact and conclusions of law (Pet. Reply Br. pp. 4-5).

Since the District Court failed to file such aforesaid findings and conclusions, it can only be inferred that the District Court accepted – however grossly erroneous as a matter of law – the considerations which led Judge Sirica to deny Petitioner's first motion.

6. Therefore, the essential conclusion of law on which the District Court relied in denying Petitioner's first and second motions was expressed in Judge Sirica's statement that "I don't think I should *at this point* intervene in the internal affairs of the University" (R. 623) (emphasis added). The Respondents rephrased the aforesaid *own* considerations of the District Court and replaced them by Conclusion of Law No. 3 which, as filed with the denial of Petitioner's first motion, now reads: "That the Court does not have jurisdiction in this case to control the internal management of the university" (R. 668).

The aforesaid theory of "non-interference in the internal management" and the underlying case law have been succinctly re-stated in Fletcher's Encyclopedia of Corporations:

> "Where... the management and control of the corporation is vested... in a board of directors or trustees, their action *in regard to the affairs of the corporation* is controlling and exclusive.... Their function is to exercise judgment and discretion which the courts cannot do in their stead, and so long as the directors of a corporation *control its affairs within the limits of the law*, matters of business judgment and discretion relating to *internal matters* are not subject to judicial review....: To the extent that the corporate

> articles place the management and control of a corporation in the hands of the directors, they are authorized to use their judgment and discretion in regard thereto. An action taken by them pursuant thereto *will not be reversed by the court at the instance of stockholders.* 5 Fletcher's Encyclopedia of Corporations (1967 Rev. Vol.) section 2104, pp. 481-483 (emphasis added).
>
> "*Reluctance of courts to interfere with the management of corporations is overcome if fraud or bad faith or over-reaching appears*" 5 Fletcher's, *supra*, p. 483, n. 36 (emphasis added).

By relying on the aforesaid theory of "non-interference in the internal management" in denying Petitioner's two motions, the District Court clearly and on several grounds erred as a matter of law and, thereby, grossly abused its discretion, namely (a) by relying on the aforesaid theory, the District Court undertook on a motion of preliminary injunction to determine the question of Petitioner's right to a permanent injunction. Thus, the District Court grossly abused its discretion by attempting to make findings of fact and conclusions of law which were not appropriate to interlocutory proceedings. See *Perry v. Perry*, 190 F.2d 601, 602 (D.C. Cir. 1951); *Interstate Transit, Inc. v. City of Detroit, Mich.*, 46 F.2d 42, 43, 44 (6 Cir. 1921). See also 5 Moore, Federal Practice (wd Ed. 1967), section 52.07, p. 2669. (b) In relying on the aforesaid theory, the District Court effectively denied justice to Petitioner by preventing him from prosecuting his main claim in respect to a permanent injunction.

> "The possibility that the court may decide the right to permanent relief adversely to plaintiff does not preclude it from granting the temporary relief.

* * *

> "Plaintiff alleges that if a preliminary injunction is not granted, it will be impossible for him to successfully prosecute the main claim. . . . Certainly a court can act where a party's conduct is calculated to frustrate litigation. . . ." *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 727, 728 (3 Cir. 1962).

(c) In relying on the aforesaid theory, the District Court erred also as a matter of law because the reluctance of courts to interfere with the internal management of corporations has been *exclusively* applied to stockholders' and similar suits. Even in such cases courts do interfere if, as shown in Petitioner's second motion (R. 209-212; 426-443) "fraud or bad faith or overreaching appears" Fletcher, *supra.* (d) In relying on the aforesaid theory, the District Court by failing to make findings showing the existence of contractual relationships between petitioner and the Respondent University (R. 168-174; 374-388; 444-445) grossly abused its discretion as a matter of law by, thus, preventing Petitioner to prosecute his claim for a permanent injunction and, thereby, in effect, denying justice to Petitioner.

Clearly, the District Court seems to have erroneously applied in the instant case the British constitutional doctrine that "The King can do no wrong" rather than the principles of equity.

Since the District Court denied Petitioner's first and second motions primarily on the erroneous ground that it should not "*at this point* intervene in the internal affairs of the university" (R. 623). (emphasis added), it did not find it necessary to make any findings of fact as to whether or not Petitioner had made a showing of irreparable injury, inadequate remedy at law, balance of equities, etc. It was only the Respondents who, as an afterthought, included in their "findings of fact and conclusions of law" a conclusory statement to the effect

that Petitioner had failed to make a showing of irreparable injury (R. 668). The aforesaid conclusory and negative finding of the District Court failed completely to conform to the standards of fairness established by this Court when it said:

> "It is of the *highest importance* to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure.
>
> * * *
>
> "...they (the appellants) were *entitled* to have *explicit* findings of fact upon which the conclusion of the court was based. Such *findings* are obviously *necessary to the intelligent and orderly presentation and disposition of the appeal.*" *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316, 317 (1940) (emphasis added).

The statement that Petitioner has an adequate remedy at law if he can prove a breach of contract and damages resulting therefrom (R. 669) is not only inappropriate but clearly intended to obscure in the fact of Petitioner's pending prayer for permanent injunction.

8. A careful reading of the *per curiam* opinion of the Court of Appeals shows the embarrassing situation in which the Court of Appeals had put itself by its determination to affirm the Orders of the District Court denying Petitioner's two motions.

Clearly, the Court of Appeals discarded the rather embarrassing "non-interference" theory on which the District Court had primarily relied in denying Petitioner's two motions. Instead, the Court of Appeals based its affirmation of the Orders of the District Court on:

> ". . .the relevance of such factors as the nature of the injury alleged in relation to the need for equitable relief, the probabilities that Appellant would ultimately prevail on the merits, and the balancing of Appellant's claimed injuries with Appellees interest and convenience in respect to the efficient operation of a university." (Pet. p. 4a).

The Court of Appeals, then, held that the findings of fact made in the District Court "were amply within the bounds of a sound judicial discretion" to deny Petitioner's motions on the grounds which the Court of Appeals had decided to substitute for those on which the District Court had relied. At first sight, this seems to be an ingenious solution for overcoming the problem with which the Court of Appeals was confronted by the District Court's gross abuse of discretion in failing to file the *mandatory* findings of fact and conclusions of law with its Order of February 8, 1968, denying Petitioner's second motion. However, the aforesaid attempt of the Court of Appeals to refuse

> ". . .to consider a substantial contention supported by authorities submitted to [it] and by such evasion [basing its] decision on a ground directly opposed to the evaded contention" *Western Pacific Railway Corp. v. Western Pacific Railway Co.*, 197 F.2d 994, 1018 (9 Cir. 1952) (Chief Judge Denman dissenting); *cert. granted* 344 U.S. 809 (1952); *vac'd* and *rem'd* 345 U.S. 247 (1953).

proves illusory in the light of the two following considerations: (i) What exactly did the Court of Appeals mean by the words that ". . .the findings of fact made in the District Court are beyond serious challenge under Rule 52(a), *Federal Rules of Civil Procedure*. . . ." (Pet. p. 4a)? (ii) Did the District Court when denying the first

Motion make, in fact, findings of *basic* facts which sustain the Court of Appeals in holding "...that the denials of a preliminary injunction founded thereon [*i.e.* on the findings of fact made in the District Court] were amply within the bounds of judicial discretion" (*ibid.*)?

(a) Rule 52(a), *Fed. R. Civ. P.* provides that:

> "...in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact [*i.e.*, it shall 'find the facts *specially*' (emphasis added)] and conclusions of law which constitute the grounds of its action."

If the words of the Court of Appeals that "the findings of fact made in the District Court are beyond serious challenge under Rule 52(a), *Fed. R. Civ. P.* ...." were intended to mean that they correspond to the facts as shown by the record, the Court of Appeals obviously failed to take into consideration (i) that Finding of Fact No. 9 is not only conclusory in nature but that it has, in addition, either no basis in fact or that it implies actual fraud on the part of the University authorities (R. 68-70); and (ii) that the so-called Conclusion of Law No. 1, which is a bare conclusion of ultimate fact, does not meet the requirements of Rule 52(a) *Fed. R. Civ. P.*

On the other hand, if the aforementioned words of the Court of Appeals were intended to mean that the findings of fact made in the District Court are a sufficient basis for denying Petitioner's motions "within the bounds of sound judicial discretion" on the grounds which the Court of Appeals substituted for those of the District Court, the Court of Appeals has, indeed, as will be shown hereinafter (pp. 11-12, *infra*), "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision" Rule 19 of the Rules of this Court.

(b) The grounds on which the Court of Appeals relied in affirming the District Court's two Orders are but a paraphrase of the theory of "estimates" developed by the aforesaid Court in *Perry v. Perry, supra.* However, it is submitted that the Court of Appeals was more candid in *Perry v. Perry, supra,* than it was in the instant case because it said there:

> "When a Motion for a Preliminary Injunction is presented to a Court in advance of a hearing on the merits, it is called upon to exercise its discretion upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of ultimate success or failure of the suit, the balance of damage or inconvenience generally. *A mere listing of the guiding considerations demonstrate their intangible nature, especially when no attempt is made at this stage to decide finally the questions raised. . . .*' We think the denial of the preliminary relief below proceeded from an erroneous premise which prevented the Court from striking the proper balance in this case" *Perry v. Perry, supra,* at 602 (emphasis added).

Clearly, the aforesaid "estimates" on which the Court of Appeals relied must not be arbitrarily established. They have to be inferences which are based on the facts which were either found by the trial court, by the Court of Appeals in *de novo* review, or which were, at least, on the record and specifically referred to by the court of appeals. The aforesaid "estimates" regardless of whether they are made by the trial court or by the Court of Appeals have clearly to be within the limits of sound judicial discretion.

> "When invoked as a guide to judicial action it [discretion] means a sound discretion, that is to say, a discretion exercised *not arbitrarily or willfully*, but with regard to *what is right and equitable under the circumstances* and the law, and directed by the reason and conscience of the judge to a just result." *Langness v. Green*, 282 U.S. 531, 541 (1931) (emphasis added).

Petitioner submits that the grounds on which the Court of Appeals affirmed the denial of the motions by the District Court are completely unsupported by any facts found by the District Court on which the Court of Appeals exclusively relied in affirming the District Court's Orders. Neither are they supported by any facts on the record before the Court of Appeals to which the aforesaid Court would have had to make specific reference if relying on them.

It is submitted that the sociological fact that in the instant case Petitioner is opposed by a powerful organization and the further sociological fact that some members of that organization's governing bodies wield considerable influence did not sufficiently distinguish *Perry v. Perry, supra*, from the instant case so as to justify the Court of Appeals to proceed from the standards established in *Perry v. Perry, supra*, but to arrive at exactly the opposite conclusion.

9. Petitioner submits that the analysis of the two sentences by which the Court of Appeals attempted to dispose summarily of the instant case reveals "a gross miscarriage of justice" Stern and Gressman, *supra*, 147, which calls "for an exercise of this Court's power of supervision" (Rule 19, *supra*).

II

Supervening Conflict of Decisions

Since the Petition for a Writ of Certiorari was filed, the following cases have been reported which show the existence of a direct and explicit conflict between the Court of Appeals for the District of Columbia Circuit and the Courts of Appeals for the Fifth and Sixth Circuits.

In *Acme Boat Rentals v. J. Ray McDermott & Co.*, 407 F.2d 1324, 1325 (5 Cir. 1969) the Court said:

> "The judgment was rendered without a statement of either findings of fact or conclusions of law. . . . Such findings of fact and conclusions of law are mandatory and must be sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the Court. . . .
>
> "The judgment is vacated. . . ."

In *United States v. Claycraft Co.*, 408 F.2d 366, 367 (6 Cir. 1969) the Court said:

> ". . .it appearing that the opinion of the District Court does not satisfy the requirements of Fed. Rules Civ. Proc. Rule 52(a), 28 USC in that the facts are not found specially to permit appropriate review by this Court and to support the ultimate conclusions of the trial court; upon consideration, it is ordered that the judgment be and it hereby is vacated and the case is remanded to the District Court with directions to make findings of facts, state conclusions of law and enter proper judgment."

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

/s/ WILLIAM H. ROBERTS
Petitioner *pro se*

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing was presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

/s/ WILLIAM H. ROBERTS
Petitioner *pro se*